

# TRIBAL ENERGY RESOURCES: REDUCING BARRIERS TO OPPORTUNITY

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## HEARING

BEFORE THE

SUBCOMMITTEE ON

THE INTERIOR, ENERGY, AND ENVIRONMENT

OF THE

COMMITTEE ON OVERSIGHT

AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTEENTH CONGRESS

SECOND SESSION

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## **TRIBAL ENERGY RESOURCES: REDUCING BARRIERS TO OPPORTUNITY**

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**Tuesday, July 17, 2018**

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON THE INTERIOR, ENERGY, AND  
ENVIRONMENT,  
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,  
*Washington, D.C.*

The subcommittee met, pursuant to call, at 10:08 a.m., in Room 2247, Rayburn House Office Building, Hon. Greg Gianforte [chairman of the subcommittee] presiding.

Present: Representatives Gianforte, Palmer, Comer, and Plaskett.

Mr. GIANFORTE. The Subcommittee on Interior, Energy, and the Environment will come to order. Without objection, the Chair's authorized to declare a recess at any time. I want to thank the panel for being here. I will begin with my opening statement.

Good morning. The Subcommittee on Interior, Energy, and the Environment is meeting today to discuss barriers to energy development on tribal lands. According to the most recent Census report, Native Americans are almost twice as likely to live in poverty than the general population. On reservations throughout the country unemployment rates are higher, and per capita income is lower than national averages.

Meanwhile tribal lands contain a wealth of untapped energy resources. According to one estimate, tribal lands contain nearly 30 percent of America's coal reserves west of the Mississippi, and as much as 20 percent of the known natural gas and oil reserves. In my home state of Montana the Crow Nation alone contains approximately 9 billion tons of coal.

Energy development projects on tribal lands can create jobs, opportunity, and a valuable source of revenue for tribal members. Despite the many positive economic benefits tribes can reap from developing their energy resources, the Federal Government makes it extremely difficult for them to do so. Most tribal land is held in trust by the Federal Government. The trust relationship charges government agencies, primarily the Bureau of Indian Affairs, within the Department of Interior, with ensuring the tribal lands and resources are well managed. Instead, the government has saddled tribes with a series of regulatory burdens. First, the energy development projects on tribal lands cost more than comparable projects on private property, or even other non-tribal federal lands.

For example, in the State of Colorado there is no fee for applying for a drilling permit on privately owned land. However, BLM

charges almost \$10,000 for a similar drilling permit on tribal land. Not only is development on tribal lands more expensive, the process is also more complex. On tribal lands acquiring the necessary permits for a project requires working with a minimum of 4 federal agencies and completing 49 different steps. On private land, permits can be obtained in as few as four steps.

The added complexity of permitting process on tribal lands goes hand in hand with regulatory delays that make developing tribal energy resources an uphill battle fought at great cost to tribes. Even the most simple of tasks can fall prey to the bureaucracy.

One tribe reported waiting six years for BIA to complete a routine title search, something that takes a matter of days for a piece of private property. Another tribe represented at today's hearing lost an estimated \$95 million on a single project while waiting years for BIA to approve right-of-way agreements. Given these challenges it should come as no surprise that many operators are discouraged from pursuing projects on tribal lands. These added costs and burdens create unnecessary impediments for tribes that wish to make decisions about how to use their own land, and they disadvantage tribes in comparison to similarly situated private land owners.

Studies abound documenting the government's shameful mismanagement of tribal resources. In 2017, the Government Accountability Office added tribal energy programs to their list of federal programs most at risk of fraud, waste, abuse, and mismanagement, citing a decade's worth of research. Fortunately, GAO also made a number of associated recommendations to help BIA improve its management of tribal resources, and BIA has reported progress towards implementing them.

Today's hearing will provide an opportunity for the committee to hear from the tribes about whether any of the changes BIA has implemented to date have had an impact. Most importantly, the testimony we hear today will highlight the biggest challenges tribes face when they want to develop their own valuable energy resources. I look forward to hearing from our witnesses today about their experiences, and especially their suggestions for an ongoing path to a future where tribes face fewer obstacles in using your land, their resources, as they see fit.

Before we begin, without objection I would like to submit for the record testimony from the Property and Environment Research Center, a think tank based in Montana, and thank them for contributing to the conversation on tribal energy issues.

Mr. GIANFORTE. I would now like to recognize my good friend, the ranking member of the subcommittee, Ms. Plaskett, for her opening statement.

Ms. PLASKETT. Thank you very much, Mr. Chairman, and thank you all for being here this morning. Thank you for the testimony, and the expertise you are going to be providing for this committee during this hearing.

Because many tribal communities are economically reliant on development of energy resources on their lands, but face barriers to using those resources, I am glad we are devoting a hearing that will address continuing concerns, and air solutions. Seventeen months ago the Government Accountability Office high-risk report

has outlined several problems that the tribes across the country face in the areas of energy, healthcare, and education.

The report characterized the Bureau of Indian Affairs' handling of tribal energy resources as mismanagement, full of delays that cost revenue to struggling tribes. One of the impediments to well-managed energy development is a failure to invest in a federal workforce to provide expertise that many tribes lack. I, coming from the Virgin Islands, understand when people can on one hand tell you that you are mismanaging, and that you have not used resources appropriately, but they have not actually given you the appropriate resources with which to get the job done initially. In fact, President Trump's hiring freeze and reorganization have aggravated that problem. BIA needs more funding to assist responsible energy development on tribal lands, not the status quo or possible cuts.

As Russell Begaye, President of the Navajo Nation, told a Department of Interior panel a year ago, "Reducing the size of the BIA could affect the fulfillment of the trust duties the U.S. has to tribes. The BIA should be filled with experts. We need the BIA to bring in economists, technology experts, and energy and resource engineers to help tribes develop the resources on their land."

I know, as I said from our experience in the U.S. Virgin Islands, that funding and expertise from the Federal Government can make a crucial difference in the lives of many. We also have severe energy issues. From 2009 to 2013, our islands developed and began implementing a long-term strategy to transition from reliance on fossil fuel to a clean sustainable energy future. With financial assistance from DOE's Office of Energy Efficiency and Renewable Energy, and from the Interior Department's National Renewable Energy Laboratory, the U.S. Virgin Islands has thoroughly evaluated its clean energy opportunities, and made a \$65 million investment in solar power.

The Department of Energy and technical experts from its renewable energy worked with our water and power authority to identify the best combination of energy technologies for the Virgin Islands to meet its clean energy goal. In 2012, a \$60,000 grant from the Department of Interior led to the development of a network of engineers, contractors, and financiers, who assisted the Virgin Islands' power customers in implementing clean energy projects.

We needed and appreciated both the financing and the expertise provided by both the Department of Energy, working with the Department of Interior, to help the Virgin Islands reach its clean energy goals. Likewise, such federal investments, not only of dollars, but also of expertise, both technically, as well as through support through the process, is vital in the effort to eventually transition tribes to capable management of their resources.

Proposals to simply give tribes more autonomy without investing more expertise, to give them the financial resources they need, as well as guide them through complicated processes, involving environmental laws, rights of way, and leases, could leave some tribes open to exploitation, or other harm. I am concerned that President Trump's and Secretary Zinke's proposed reorganization could severely compromise the ability of BIA and the Department of Ener-

gy's Office of Indian Energy and Economic Development from providing the expertise many tribes need.

I am asking that my colleagues on both sides of the aisle look to ensuring that any DOI reorganization does not further impede the BIA from fulfilling its trust responsibility, and give the BIA the resources and staffing it needs to ensure the best energy future for all the tribal communities.

Thank you so much, Mr. Chairman, for holding this hearing, and I look forward to the testimony and the questions to follow.

Mr. GIANFORTE. Yes. Thank you. And I am very pleased to introduce our panel today. I want to thank each one of you for traveling here. I understand you went through some circuitous routes, and lost some sleep, but it's good to have you hear all smiling on the panel.

First, the Honorable Alvin Not Afraid, Jr., Chairman of the Crow Tribe of Indians in my home State of Montana; the Honorable Adam Red, Councilman of the Southern Ute Indian Tribe; Mr. Eric Henson, Executive Vice-President of Compass Lexecon; and Mr. Christopher Deschene, partner at Rosette, LLP. Thank you, gentlemen, for being here.

Pursuant to committee rules, all witnesses will be sworn in before they testify. Please remain seated, and raise your right hand. [Witnesses sworn.]

Mr. GIANFORTE. The record will reflect that the witnesses answered in the affirmative. In order to allow time for our discussion here today, please limit your testimony to five minutes. Your entire written testimony will become part of the permanent record, however. As a reminder, the clock in front of you shows your remaining time. The light will turn yellow when you have 30 seconds left, and red when your time is up. Also, please remember to press the button to turn the microphone on. It does not work automatically.

So with that, I would like to recognize Chairman Not Afraid for your testimony.

## **WITNESS STATEMENTS**

### **STATEMENT OF ALVIN NOT AFRAID**

Mr. NOT AFRAID. Good morning. Thank you Chairman Gianforte, Ranking Member Plaskett, and Member Comer. Also the members that serve on this panel. Very important subcommittee we have here.

I appreciate the opportunity to share my views and the views of the people I represent regarding the impediments to energy production in Indian Country. My name is Alvin Not Afraid, Jr., and I am the Chairman of the Crow Tribe of Indians. We are more than 14,000 members strong, and we own more than 2.2 million acres in the West, along the Bighorn River. Our land is rich in energy resources, natural resources, and minerals. So this topic is close to the hearts of the Crow People.

The Crow Tribe owns 9 billion ton of mineable coal, constituting 3 percent of the U.S. reserves. Yet, we only have one active mine. Colorado-based Westmoreland Resources currently leases the Absaloka Mine, which has existed since 1974. We love our land and our homes, but our inability to grow our local economy through the



development of our energy resources ensures that we will never rise out of the cycle of poverty that we find ourselves in today.

While every impediment we face cannot be fixed by the Federal Government, many of them can, such as one, cumbersome Indian coal and oil gas approval processes; number two, long wait times for those approvals; number three, numerous federal agencies and offices, both within and beyond the Bureau of Indian Affairs that must grant approval for energy development contracts to move forward; four, cumbersome regulations promulgated without meaningful consultation with energy tribes; though we are appreciative of the work done to repeal many of those in this last year by the Administration; number five, poorly kept and incomplete records from which critical decisions must be made; number six, inexperienced bureaucrats who oversee the entire approval process.

Barriers to economic development costs Indians millions of dollars in lost revenue. If the Crow Tribe wants to enter into an oil gas lease on a land that the tribe owns, we face a process of long wait times, usually years, for approval. We also face bureaucracy. The BIA was created long ago, in part because it was thought that Indians could not intellectually evaluate business contracts, purchase agreements, leases, and other economic tools. Yet, in an ironic twist of fate, it is now the BIA, according to the GAO and Interior's OIG, that lacks the intellectual capacity to evaluate business contracts, purchase agreements, leases, and other energy development mechanisms.

Consider this from the viewpoint of a businessman. This will be easy exercise for you, Mr. Chairman, being a self-made and highly successful businessman yourself. Would you have asked the random tourist, with no knowledge of your company, who was passing through Bozeman, to approve a purchase agreement you wish to make? As CEO of Right Now Technologies, I am sure you would not have. They do not have the expertise that you do about your company. So it doesn't make any sense, right? And that's exactly how we feel at the Crow Nation.

It will take time to roll back the oppressive regulations that the previous administration used to perpetuate the war on coal, and we appreciate all the work that has been done to date by this Congress and this Administration. All of us in government roles during this time are in the same predicament. From the president, to Congress, to me, as chairman, we all find that we are fixing problems not of our making, and certainly not of our choosing.

So how can we work together to fix these problems? I advocate for the following. One, at home I am working with federal investigators to clean up decades of financial mismanagement, and codify oversight controls within our government. These are self-help steps that we are taking in order to be accountable for our own welfare, and to create a healthy atmosphere for private investment in Crow.

Number two, at the congressional level I ask you to cosponsor and support S.245, sponsored by Senator Hoeven, and passed by the Senate in December of 2017. I believe that we will correct these issues currently stifling progression of the Tribal Energy Resource Agreement mechanism. If these fixes become law, it is my intention

to ensure that the Crow Tribe is the first to apply for and enter into a TERA agreement with the Secretary of Interior.

Three, finally, I urge you to continue to seek the expertise of organizations that are educating tribal leaders, federal-elected officials, and future generations as to the best ways to promote private economies in Indian Country. Specifically, the research of Dr. Terry Anderson, at the Hoover Institute, and the tribal leaders of Alliance for Renewing Indigenous Economies. Their scholarship is groundbreaking, and it remains some of the only, such as reservation-based, free-market focus decisions in the public sphere today.

In closing, while most of us recognize the barriers of tribal energy development, the answers are not simple. We are trying to free up economies on the reservation underneath a complex framework of mixed government ownership of assets. Our nation-to-nation relationship means that we are all caught in a delicate web of legal promises and historical responsibilities, as well as racial and cultural sensitivities.

So at this time I would like to thank Chairman Gianforte for the invite to speak on behalf of Crow Tribe. Thank you.

[Prepared statement of Mr. Not Afraid follows:]

## CROW TRIBE EXECUTIVE BRANCH



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**Alvin Not Afraid, Jr.**  
CHAIRMAN

**Carlson Goes Ahead**  
VICE-CHAIRMAN

**Rudolph Old Crow, Sr.**  
SECRETARY

**Shawn Backbone**  
VICE-SECRETARY

### TESTIMONY OF CHAIRMAN ALVIN "A.J." NOT AFRAID, JR., OF THE CROW TRIBE OF INDIANS BEFORE THE U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM SUBCOMMITTEE ON THE INTERIOR, ENERGY, AND ENVIRONMENT JULY 17, 2018

Good Morning! Thank you Chairman Gianforte, Ranking Member Plaskett, and Members of this important Subcommittee. I appreciate the opportunity to share my views, and the views of the People I represent, regarding the impediments to energy production in Indian Country.

My name is Alvin Not Afraid, Jr. and I am the Chairman of the Crow Tribe of Indians. We are more than 14,000 Members strong, and we own more than 2.2 million acres in the West, along the Big Horn River, and it is the most beautiful country under Creation.

Our land is rich in energy resources, natural resources, and minerals. So this topic is near and dear to the hearts and the pocket-books of the Crow people. The Crow Tribe owns nine (9) billion tons of mineable coal, constituting three-percent (3%) of US mineable coal reserves; yet we have only one active mine. Colorado-based Westmoreland Resources, Inc., currently leases the Absaloka Mine. The mine has produced more than 200 million tons of coal since 1974. It was producing five (5) to seven (7) million tons of coal per year, but has recently decreased its production to three (3) million tons per year in part because of over-regulation. This number is extremely low, as the mine has the capacity to produce as much as 10 million tons per year.

The Crow Tribe depends on coal tax and royalty revenue from this mine for up to two-thirds (2/3) of our non-Federal revenue annually, including essential Member services, such as care for elders, and basic infrastructure projects, such as road maintenance.

Coal is not the only resource that we have in abundance. We also sit on a significant oil & gas field. Independent geologist estimates place our oil reserves at approximately 3.3 million barrels of oil in prospected areas alone. We have only prospected approximately 10% of the reservation, so we believe that there are millions more barrels to be found.

Yet despite owning these economic assets – we experience extreme economic disparities when compared with non-tribal, non-federal owners of coal and oil reserves. In short, we are facing a significant budget crisis – projected revenue from our coal mine is half of what it was seven years ago, before the War on Coal began under the last Administration.

*The Great Apsáalooke Nation: "Teepee Capital of the World"*

TESTIMONY OF CHAIRMAN ALVIN "A.J." NOT AFRAID, JR.  
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Further, the Crow Nation's unemployment rate sits at 80%, compared with the State of Montana's unemployment rate of 3.8%. This unemployment rate, and the lack of non-federal income and jobs in Crow, means that we endure the same economic conditions that were once faced by the communist satellite states of Eastern Europe: poverty, hunger, poor sanitation, the absence of industry and an aging infrastructure. We love our land and our homes, but our inability to grow our local economy, through the development of our energy resources, ensures that we will never rise out of the cycle of poverty that we find ourselves in today.

As with any problem we are faced with, there are many issues impeding the development of our natural resources. While every impediment cannot be fixed by government, many of them can.

Some of the government-related challenges we face include:

- Cumbersome Indian coal and oil & gas lease approval processes
- Long wait times for those approvals
- Myriad federal agencies and offices, both within and beyond the Bureau of Indian Affairs (BIA), that must grant approval for energy development contracts to move forward
- Cumbersome regulations, promulgated without meaningful consultation with Energy Tribes – though we are appreciative of the work done to repeal many of those in the last year.
- Poorly kept and incomplete records, from which critical decisions must be made
- Inexperienced bureaucrats who oversee the entire approval process

Barriers to economic development cost Indians millions of dollars in lost revenue. Consider that if an Indian rancher – off the reservation – owns his own land, and wants to enter into an oil and gas lease, he can do so. The permits are fairly cheap, easy and quick to obtain, and he is free to make his own determination as to whether the agreement is in his interest. If the Crow Tribe wants to enter into an oil or gas lease – on land that the Tribe owns – we face a process of long wait times. We wait and wait and wait.

And what are we waiting for?

We wait for permission from the federal government. By law, we need the BIA to bless our business contracts.

The BIA was created long ago, in part because it was thought that Indians could not intellectually evaluate business contracts, purchase agreements, leases and other economic tools. Yet, in an ironic twist of fate, it is now the BIA – which according to the GAO and DOI-OIG – that lacks the intellectual capacity to evaluate business contracts, purchase agreements, leases and other energy development mechanisms.

It is the tale that every freedom-loving American knows: the government lacks the ability to perform the role it has taken for itself, yet we are at its mercy.

So, we wait for the Bureau of Indian Affairs – with no expertise in the field of energy development – to approve the lease agreement. We wait years for this.

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TESTIMONY OF CHAIRMAN ALVIN "A.J." NOT AFRAID, JR.  
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The companies we wish to do business with must wait and wait as well. Good companies, legitimate developers, do not want to wait for government permission. In fact they can't wait, or they will bankrupt themselves.

Consider this from the viewpoint of a businessman. This will be an easy exercise for you, Mr. Chairman, being a self-made and highly successful businessman yourself: would you have asked a random tourist, passing through Bozeman, to approve purchase agreements you wished to make, as CEO of RightNow Technologies? I am sure you would not have, as they would not possess the knowledge to make such a decision. So why would a Tribe be forced to request approval of a bureaucrat, adept at stapling papers, to determine whether an oil and gas lease is a good deal for the Tribe?

It will take time to roll-back the oppressive regulations that the previous Administration used to perpetrate the War on Coal. And we appreciate all of the work that has been done to-date, by this Congress and this Administration, to create a positive and healthy atmosphere for energy development and energy security for the United States.

All of us who run governments during this time, are in the same predicament: from the President, to Members of Congress, to the Secretary of the Interior and to me, as Chairman of the Crow Tribe of Indians. We all find that we are trying to fix problems not of our making, and certainly not of our choosing. So how can we work together to fix these problems?

I advocate the following:

- At home, I am working with federal investigators to shine a light on waste, fraud and abuse. The Crow Administration is working to build capacity and skills within the Tribe; so that we can "educate locally" and "hire locally". We are cleaning up decades of financial mismanagement and codifying oversight controls within our government. Like every government, we are staying vigilant and we are maintaining constant oversight of our programs and over taxpayer dollars. These are self-help steps that we are taking, in order to be accountable for our own welfare, and to create a healthy atmosphere for private investment in Crow.
- At the Congressional level, I ask you to co-sponsor and support S. 245, by Senator Hoeven and passed by the Senate in December of 2017. This bill, which awaits consideration by the House Committee on Natural Resources, Energy and Commerce, is a tremendous step forward for both tribal energy regulations and economic development initiatives. We believe that it will correct issues currently stifling progression of the Tribal Energy Resource Agreements (TERAs). If these fixes become law, it is my intention to ensure that the Crow Tribe is the first to apply for and enter into a "TERA agreement" with the Secretary of the Interior.
- Modify the HEARTH Act to include mineral development: currently the HEARTH Act allows Tribes to approve leases for activities such as wind and solar energy development, and for business purposes, after the Interior Department approves Tribal regulations. These regulations must include an environmental review process. Despite these safeguards, mineral leasing was excluded from the list of activities, but should be

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TESTIMONY OF CHAIRMAN ALVIN "A.J." NOT AFRAID, JR.  
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included. This would return to Tribes the freedom of self-determination in the development of ALL energy resources, not just those favored by special interests.

- Finally, I urge you to continue to seek the expertise of organizations that are educating tribal leaders, federal elected officials, and future generations, as to the best ways to promote private economies in Indian Country. Specifically, the research legacy of Dr. Terry Anderson, at the Hoover Institute, and the tribal leaders of the Alliance for Renewing Indigenous Economies. Their scholarship is groundbreaking, and remains some of the only reservation-based, free-market-focused discussions in the public sphere today. They are advanced in their research and in their innovative solutions for creating capitalist economies within the Treaty-Trust framework.

In closing, while most of us recognize the barriers to tribal energy development, the answers are not simple. We are trying to free-up economies on reservations, underneath a complex framework of mixed government ownership of assets. Our nation-to-nation relationship means that we are all caught in a delicate web of legal promises and historical responsibilities, as well as racial and cultural sensitivities.

That is a difficult tight-rope to walk, for all of us.

But I appreciate that by holding this hearing and focusing on our issues, you are willing to walk this tight-rope with the Great Apsaalooke Nation. As for our Tribe, we are open to testing innovative solutions and challenging old doctrines, in partnership with anyone who seeks the same – including Members of this Subcommittee. We ask only that these innovative solutions come to us with more freedom, and less government. It's the simplest of principles, but truly, the most important.

Thank you.

***The Great Apsaalooke Nation: "Teepee Capital of the World"***

Mr. GIANFORTE. Thank you, Chairman.  
And Councilman Red, you are recognized for your five minutes of testimony.

#### STATEMENT OF ADAM RED

Mr. RED. Thank you. Good morning, Chairman Gianforte, Ranking Member Plaskett, and members of the subcommittee. I am Adam Red, elected member of the Southern Ute Indian Tribal Council. Thank you for inviting us to testify. Our tribe story attests to our ability to responsibly manage our own natural resources. We are an example of the positive impact of federal legislation that allows tribes to assume a greater role in energy development on their reservations.

Federal laws require federal review and approval of most realty transactions involving Indian lands and minerals. Our tribal leadership has always believed that we can do a better job of managing our resources than would federal agencies. Unlike federal agencies, we have a vested interest in protecting our resources and maximizing economic returns for those resources. In keeping with that philosophy, we have taken advantage of most congressionally created opportunities to exercise self-determination, like the Indian Mineral Development Act of 1982. The IMDA allowed tribes to negotiate their own leases, subject, of course, to BIA approval. With that important legislation, we negotiated favorable terms in our oil and gas leases, which United States didn't have the incentive to negotiate for on our behalf.

Less than 50 years ago our tribe had to stop distributing per capita payments to tribal members because we couldn't afford them. Today, the tribe's oil and gas companies conduct activities in several Western states. We also invest in non-energy projects, including real estate properties across the country. Today, a tribe provides health insurance for its tribal members, and promises all members access to a college education. We are the largest employer in our region, and we are the only tribe in the nation with a AAA credit rating from Standard & Poor's. We have been successful despite the obstacles created by underfunded, understaffed federal agencies like the BIA. Those obstacles are a very real problem, because they create a significant disincentive to developing oil and gas on tribal land.

For example—please queue the slide. Permitting a well on private land typically takes four months. Permitting a well on tribal land can take more, like 30 months. A drilling permit from the state for drilling on private land is free. A drilling permit from the BLM to drill on tribal land is \$9,500. Tribal land is treated like public land, and is subject to NEPA and a public comment process. Private land is not.

On reservations like Southern Ute, where private land and tribal land are interspersed, drilling on private land is significantly faster and cheaper, and an operator can drill on private land and still drain tribal minerals. Please take down the slide.

We are grateful for the new attention GAO and OIG have brought to this issue, but there is a lot of work to be done. We have some suggestions. Enact S.245, which will allow tribes to choose to play a larger role in the energy development process, while the

United States plays a smaller role. This is a solution that can be achieved without increasing federal funding or staffing.

BIA must recruit realty staff in order to process our transactions. With the Southern Ute agency we have had two realty specialist positions that have been vacant for several years. Recently, the agency extended two offers to fill those positions. But one of the selected applicants ultimately declined her offer after the Bureau failed to approve the incentive package in a timely manner. BIA always tells us they can't hire people here because of the high cost of living in our region. We need a cost-of-living adjustment from OPM for our area.

BIA must hire and train people to work on TAAMS, so that the BIA can verify land ownership information in a timely manner. With more TAAMS trainings, more BIA staff devoted to TAAMS, and loosening of the requirements for tribally funded staff to do TAAMS and coding, this situation could be improved.

Interior must define inherently federal functions. Under the Energy Policy Act of 2005 Congress established a mechanism called a TERA that allows tribes to enter into energy-related transactions without prior BIA review and approval. This would have been a dramatic improvement, but the implementing regulations created an unlegislated, undefined exception to the scope of TERA.

The implementing regulations say a tribe may not assume inherently federal functions. Despite our numerous requests Interior refuses to define that term. Contrary to the GAO's recent findings, the BIA has failed to resolve this regulatory blockage. Another suggestion we have is that Congress act to accelerate environmental studies under NEPA and ensure timely NHPA compliance.

In conclusion, our tribe, like many other tribes, is well equipped to utilize our energy resources. We need more support for tribal self-determination for tribes willing to assume responsibility for managing their energy resources. We believe that this approach should be at the forefront of any congressional oversight and action taken in response to GAO's and OIG's reports. The tribe appreciates the continued efforts of this Congress, this subcommittee, and others to encourage tribal self-determination through economic and energy development. Thank you.

[Prepared statement of Mr. Red follows:]



**BEFORE THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM  
SUBCOMMITTEE ON THE INTERIOR, ENERGY, AND ENVIRONMENT  
UNITED STATES HOUSE OF REPRESENTATIVES**

**Prepared Statement of Honorable Adam Red  
Councilman, Southern Ute Indian Tribal Council**

**On behalf of the  
SOUTHERN UTE INDIAN TRIBE  
Hearing  
“Tribal Energy Resources: Reducing Barriers to Opportunity”  
July 17, 2018, 10:00 a.m.  
Rayburn House Office Building**

**I. Introduction.**

Good morning, Chairman Gianforte, Ranking Member Plaskett, and Members of the Subcommittee. I am Adam Red, an elected member of the Southern Ute Indian Tribal Council, the governing body of the Southern Ute Indian Tribe (Tribe). Thank you for the opportunity to provide a statement on behalf of the Tribe regarding the regulatory challenges that Indian tribes face in pursuing energy development on tribal lands.

In this testimony, I will first provide some background about our Reservation and the importance of energy development to our Tribe. Second, as members of this Subcommittee are aware, in recent years, the Government Accountability Office (GAO) and the Department of the Interior Office of Inspector General (OIG) have issued critical reports highlighting the dysfunctionality of the Bureau of Indian Affairs in managing energy resource development in Indian country.<sup>1</sup> GAO concluded that those deficiencies were of sufficient magnitude as to warrant inclusion of BIA’s energy resource management practices among a list of 34 “High-Risk” areas of government administration.<sup>2</sup> Approximately one month ago, GAO and the BIA reported on the progress that BIA has made in addressing specific deficiencies previously identified by GAO.<sup>3</sup> My testimony will comment on whether any progress has been realized at

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<sup>1</sup> See, e.g., U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-502, INDIAN ENERGY DEVELOPMENT; POOR MANAGEMENT BY BIA HAS HINDERED ENERGY DEVELOPMENT ON INDIAN LANDS (2015); OFFICE OF INSPECTOR GENERAL, U.S. DEP’T OF INTERIOR, RPT. NO. CR-EV-BIA-0011-2014, BUREAU OF INDIAN AFFAIRS’ SOUTHERN UTE AGENCY’S MANAGEMENT OF THE SOUTHERN UTE INDIAN TRIBE’S ENERGY RESOURCES (2016).

<sup>2</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-375T, PROGRESS ON MANY HIGH-RISK AREAS, WHILE SUBSTANTIAL EFFORTS NEEDED ON OTHERS (2017).

<sup>3</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-616T, HIGH RISK; AGENCIES NEED TO CONTINUE EFFORTS TO ADDRESS MANAGEMENT WEAKNESSES OF FEDERAL PROGRAMS SERVING INDIANS (2018); GAO HIGH RISK LIST: TURNING AROUND VULNERABLE INDIAN PROGRAMS: OVERSIGHT HEARING BEFORE S.

our local BIA Agency with respect to key matters of concern. Third, as representatives from our Tribe have done for many years in addressing different committees of Congress, I will identify some of the systemic barriers to effective energy development in Indian country, and I will provide several suggestions for improving the current system so that energy development in Indian country can proceed in a reasonable manner for the benefit tribes, their members and energy producers.

## **II. Southern Ute Indian Reservation Background**

The Southern Ute Indian Reservation—the homeland of our Tribe’s 1500-plus members—consists of approximately 700,000 acres of land located in southwestern Colorado in the Four Corners Region of the United States. Our Reservation is part of the northern San Juan Basin, an area that has seen widespread oil and gas development for more than 70 years. The Reservation is a complex patchwork of land ownership. Almost one-half of the Reservation is owned in entirety by the United States in trust for the Tribe. Additionally, the Tribe owns the beneficial trust interests in several hundred thousand acres of severed mineral estates reserved by the United States in homestead patents issued between 1909 and 1934 (the scope of the reserved mineral estate depends on the authorizing homestead law). In many instances, non-Indians own surface estates or subsurface mineral interests that are adjacent to tribal surface tracts or tribal mineral estates. Accordingly, our Reservation is a prime example of a 3-D checkerboard.

## **III. Federal Mineral Leasing Laws and the Tribe’s History of Energy Development**

Federal laws and regulations require federal review and approval of most realty transactions involving Indian trust lands and minerals. One recently-created exception to that rule is found in the surface leasing of tribal lands by tribes who have met the requirements of the Helping Expedite Affordable and Responsible Tribal Homeownership Act of 2012 (“HEARTH Act”).<sup>4</sup> To be sure, since enactment of the Indian Reorganization Act of 1934,<sup>5</sup> Congress has required tribal governmental consent to the use of tribal lands; however, with few exceptions, ultimate control of tribal energy development continues to rest with the BIA, which retains final approval

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COMM. ON INDIAN AFFAIRS, 100 CONG. (2018) (statement of Darryl LaCounte, Acting Director, Bureau of Indian Affairs (June 13, 2018) .

<sup>4</sup> Act of July 30, 2012, Pub. L. No. 112-151 (codified at 25 U.S.C. § 415(h)). As of May 2018, 39 tribes are managing approved surface leasing ordinances pursuant to the HEARTH Act.

<sup>5</sup> Act of June 18, 1934, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101, *et seq.*, formerly 25 U.S.C. §§ 461, *et seq.*)

authority under the Indian Mineral Leasing Act of 1938,<sup>6</sup> the Indian Mineral Development Act of 1982 (“IMDA”),<sup>7</sup> and the General Right of Way Act of 1948.<sup>8</sup>

Beginning in 1949, the Tribe began issuing mineral leases under the supervision of the Secretary of the Interior. For several decades, we received modest royalty revenue, but were not engaged in any comprehensive resource management planning. That changed in the 1970s as we and other energy resource tribes in the West recognized the potential importance of monitoring oil and gas companies for lease compliance as well as keeping a watchful eye on the federal agencies charged with managing our resources. In 1974, the Tribal Council placed a moratorium on new oil and gas leasing on the Reservation until the Tribe could gain a better understanding of its resources and the long-term consequences of its leasing decisions. That moratorium remained in place for 10 years.

A series of events in the 1980s laid the groundwork for our subsequent success in energy development. In 1980, the Tribal Council established an in-house Energy Department, which spent several years gathering historical information about our energy resources and lease records. In 1982, following the Supreme Court’s decision in *Merrion v. Jicarilla Apache Tribe*,<sup>9</sup> the Tribal Council enacted a tribal severance tax law, which has produced more than \$800 million in revenue over the last three-plus decades. After Congress passed the IMDA in 1982, we carefully negotiated mineral development agreements with oil and gas companies involving unleased lands, and insisted upon flexible provisions that vested the Tribe with business options and greater involvement in resource development.

Under the IMDA, the BIA approved those tribally-negotiated agreements; however, as the complexity of those agreements increased to address such matters as monetization of non-conventional fuel tax credits and other novel provisions, the delays associated with obtaining BIA approval proved frustrating and costly. The Tribe’s leaders believed that the Tribe could do a better job of monitoring its own resources than would federal agencies, and, consistent with that philosophy, shortly after passage of the Federal Oil and Gas Royalty Management Act of 1982, the Tribe entered into a cooperative agreement with the Minerals Management Service (now Office of Natural Resource Revenue (ONRR)) permitting the Tribe to conduct its own royalty accounting and auditing. The Tribe can attest to the importance of federal legislation that allows tribes the option of assuming a greater role in energy development on their reservations.

In 1992, we started our own gas operating company, Red Willow Production Company, which was initially capitalized through the Tribe’s Secretariially-approved plan for use of \$8

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<sup>6</sup> Act of May 11, 1938, 52 Stat. 347 (codified at 25 U.S.C. §§ 396a-396g).

<sup>7</sup> Act of December 22, 1982, Pub. L. No. 97-382, 96 Stat. 1938 (codified at 25 U.S.C. §§ 2101-2108) (“IMDA”).

<sup>8</sup> Act of February 5, 1948, 62 Stat. 17 (codified at 25 U.S.C. §§ 323-328).

<sup>9</sup> 455 U.S. 130 (1982).

million of tribal trust funds received by our Tribe in settlement of reserved water right claims. Through conservative acquisition of on-Reservation leasehold interests, we began operating our own wells and received working interest income as well as royalty and severance tax revenue paid by Red Willow. In 1994, we participated with a partner to purchase one of the main pipeline gathering companies on the Reservation. Today, the Tribe is the majority owner of Red Cedar Gathering Company, which provides gathering, processing, and treating services throughout the Reservation. Ownership of Red Cedar Gathering Company allowed us to put the infrastructure in place to further develop and market coalbed methane gas from Reservation lands and provided an additional source of revenue. Our tribal leaders recognized that the peak level of on-Reservation gas development would be reached in approximately 2005, and in order to continue our economic growth, we expanded operations off the Reservation.

#### **IV. Positive Results for the Tribe, Our Members and the Surrounding Community**

These acts of energy development through self-determination are key to the Tribe's economic success. Today the Tribe, through its subsidiary energy companies, conducts sizeable oil and gas activities in several western states and in the Gulf of Mexico. We are the largest employer in the Four Corners Region of southwest Colorado. Energy resource development has unquestionably had a great positive impact on the Tribe, our members, and the surrounding community. The regional community college even has a new associate degree program in Tribal Energy Management, and because of the Tribe's vast experience in this realm, the college has enlisted the Tribe's assistance and input.

Our energy-related economic successes have resulted in a higher standard of living for our tribal members. Our members have jobs. Our educational programs provide meaningful opportunities at all levels. Our elders have stable retirement benefits. We have exceeded many of our financial goals, and we are well on the way to providing our grandchildren and their grandchildren the opportunity to maintain our Tribe and its lands in perpetuity.

Along the way, we have encountered and overcome numerous obstacles, some of which are institutional in nature. As we have stated repeatedly to anyone who will listen to us, "We are the best protectors of our own resources and the best stewards of our own destiny; provided that we have the tools to use what is ours." Successful energy development, in spite of institutional obstacles, has also enabled the Tribe to invest in diverse, non-energy projects, laying the foundation for long-lasting economic prosperity. For example, the Tribe has made real estate investments in eleven markets located in eight states. These investments include residential, commercial, industrial, and hotel properties in California, Nevada, Colorado, Texas, Kansas, Illinois, Ohio, and Maryland. Return on these investments has spurred further economic growth for the Tribe, which would not have been possible but for the Tribe's active efforts to control and develop its energy resources. Our Tribe is the only Indian tribe in the nation with a credit rating of AAA+, which was earned through years of steady governance and prudent business management.

## V. OIG and GAO Reports on BIA Energy Resource Management

In late 2014 through early 2015, the OIG reviewed the BIA Southern Ute Agency's management of energy resources on the Reservation, including a review of staffing needs and record keeping functions. The resulting OIG Report No. CR-EV-BIA-0011-2014, issued in February 2016 ("OIG Report"), concluded that the Southern Ute Agency was not adequately staffed to process the substantial energy resource transactions regularly submitted for approval by the Tribe, and delays in approval were costing the Tribe substantial amounts of revenue. To help offset Agency deficiencies, the Tribe was performing (without cost to the BIA) much of the work that should have been performed by BIA in assembling documentation and assisting in the processing of requests related to energy leases and energy rights-of-way. Further, the records of the Agency were not being properly protected or organized. The OIG made seven recommendations intended to improve the functionality of the Agency, such as increasing energy staffing and training and improving record keeping practices. As a paper-keeping item, the OIG also recommended that a written Memorandum of Understanding be prepared "that would better define the Tribe's role in performing work to support BIA's review and approval of the Tribe's mineral leasing activities." OIG Report at 15. Since issuance of the OIG Report, with assistance from personnel from the Tribe, many of the BIA files have been re-organized. In January of 2017, the BIA and the Tribe entered into an MOU memorializing the support that the Tribe's Department of Energy is providing to the Agency. However, the Agency continues to lack sufficient well-trained staff with knowledge of energy and real property matters needed to process such transactions in a reasonably timely manner.

While the OIG was preparing the OIG Report, the GAO was undertaking a broader investigation of factors that have hindered energy resource development in Indian country. The ensuing report issued in June of 2015, GAO-15-502, identified multiple impeding factors, including complicated land ownership patterns, regulatory involvement of multiple federal agencies in overseeing energy-related operations, and delays in obtaining environmental clearances under laws like the National Environmental Policy Act (NEPA). Additionally, however, GAO found a variety of systemic shortcomings in BIA's management of energy resources. Among those deficiencies were inadequate data to confirm ownership status of tribal lands and minerals. The Trust Asset and Accounting Management System (TAAMS), deployed twenty years earlier to modernize complex tribal real property records, reportedly lacked GIS mapping capability. A number of tribes reported delays taking years to process rights-of-way, surface leases for wind projects, and energy related permits. In a number of cases the delays simply outlasted the opportunities. As at the Southern Ute Agency, other BIA agencies also lacked qualified staff needed to evaluate and process energy related transactions. GAO provided a number of recommendations for improvement; however, it is noteworthy that the Department of the Interior did not concur in a number of GAO's findings.

On February 15, 2017, GAO issued a High-Risk Series Report GAO-17-375T ("GAO High Risk Report"), outlining the status of high-risk areas of federal governmental administration. Significantly, that GAO report added to the high-risk list the management of several federal

programs that serve tribes and their members, including programs related to Indian education, health care delivery, and energy administration. The BIA energy-related deficiencies included excessive delays in processing transactional documents, an absence of collaboration with other federal agencies, and workforce planning issues. Further, GAO “found issues with outdated and deteriorating equipment, technology, and infrastructure, as well as incomplete and inaccurate data.” GAO High Risk Report at 34-35. To help correct the situation, GAO issued a number of recommendations, such as upgrading TAAMS to include GIS mapping capability, establishment of a tracking system for processing energy-related documents, upgrading BIA workforce needs, and issuance of guidance regarding Tribal Energy Resource Agreements (TERAs).

Most recently, on June 13, 2018, high level officials from GAO and BIA delivered statements to the Senate Committee on Indian Affairs regarding the status of progress in improving BIA’s management of tribal energy resources. These statements, GAO-18-616T (GAO Supplement Report) and Testimony of Acting BIA Director Darryl LaCounte (BIA Testimony), express the respective views of the GAO and BIA as to whether the previous recommendations of the GAO have been followed.

#### **VI. Has Progress Been Made?**

While we have little doubt that some progress has been made at some levels within the BIA to improve energy resource management functions, at the Southern Ute Agency there is still a great deal of work that must be completed before the BIA reaches a level of reasonable and acceptable proficiency. It must be stressed, however, that our concerns are not intended to reflect poorly on the dedication or the hard work of the local Superintendent or her limited staff. Our Superintendent and the Deputy Superintendent work extremely hard in attempting to clear up back logs and in processing new transactions. The BIA simply has not provided them the tools necessary to move forward more effectively.

**1. TAAMS.** One of GAO’s major concerns relates to the ability of the BIA to verify land ownership information in a timely manner, and toward that end, GAO recommended adding GIS mapping capability to TAAMS. BIA recently reported that the GIS mapping module has been installed, the map viewer has been deployed, and the recommendation has been implemented. We question whether that capability exists on a system-wide basis and whether it includes our Reservation. The effectiveness of TAAMS requires proper encoding of ownership records and related transactional documents. For reasons that will likely never be known, the BIA failed to encode into TAAMS the real property transactional documents related to key periods of the Tribe’s energy development in the late 1990s and early 2000s. Documents for substantial periods of time have simply never been encoded. So, while it is possible that a GIS mapping component has been added to TAAMS, its capacity to interface with ownership information to confirm ownership status quickly can only function effectively if the underlying documents have also been properly encoded in TAAMS. The process of encoding documents into TAAMS requires specialized training and tedious application, and the encoding protocols do not necessarily correspond to the Tribe’s preferred structuring of transactions.

For example, our Tribe and major energy companies on the Reservation prefer to handle the renewal of a company's rights-of-way all at once. This utterly rational approach allows the Tribe to more easily monitor the end date and renegotiate renewals when an operator's hundreds of rights-of-way are handled together. In one instance, the Tribe was even able to leverage the renewals to require an operator on the Reservation to replace several grandfathered high pollutant-emitting 1950s-era compressor engines in lieu of paying compensation for the right-of-way renewal. The elimination of the old compressor engines was a great way to improve Reservation air quality. However, when the Tribe presented one such "global rights-of-way" package to the Southern Ute Agency for approval, it took the Agency approximately *four years* to approve it. The Tribe later learned that the biggest hurdle to prompt approval was that there was no effective way to enter the multiple, individual rights-of-way segments, bundled in one transaction, into TAAMS. The unwieldiness of TAAMS has been cited numerous times as the reason for delays in energy transaction processing.

Moreover, because a number of "global rights-of-way" were not processed through TAAMS ten or twenty years ago, it is now the BIA practice to simply hold onto global renewal agreements without approval until the original agreements expire and then grant entirely new rights-of-way for a new global time period. A right-of-way renewal apparently cannot be processed through TAAMS unless the earlier grant is already in the system. Notwithstanding the fact that operating facilities via expired rights-of-way may constitute a trespass, or place a company with financing in default of its loan covenants, the challenges of data system processing govern over the mutual business intentions of the Tribe and its corresponding party. Further, if the transactions are not encoded in TAAMS, then formal recording in the Land Title and Records Office of the BIA cannot proceed, yet the LTRO is supposed to be official depository of Indian land ownership records.

**2. Tracking Review and Response Times.** To improve efficiency and transparency, the GAO recommended development of a tracking system that could monitor when a document needing BIA approval was received and its status until approval. The BIA believes it is close to implementing this system, and, has apparently implemented the system in monitoring Communitization Agreements needed to pool interests in leases to conform to well density and spacing requirements. Our experience is that the logging of a document as having been received by the BIA does not necessarily correspond to its delivery to the Agency. Instead, a document is not considered received until the Agency makes a determination that it is complete, a process that itself may take several months. When the document is then reviewed for completeness, new interpretative requirements may be added that will further delay a determination of completeness that starts the clock ticking. Accordingly, the tracking system may reflect a distortion of the actual time for processing documents delivered to the BIA for approval.

**3. Workforce Planning and Recruitment.** For several years, GAO has recommended that the BIA take steps needed to evaluate workforce needs, with the objective that, through training and recruitment, the BIA can develop the workforce needed to meet its trust duties in energy management. The GAO reports that BIA has conducted internal surveys to identify

general workforce needs related to oil and gas development, and the BIA confirms that it needs engineers, engineering technicians and environmental scientists to assist tribes with energy development. In that regard, we doubt if there are more than one or two qualified petroleum engineers in the entire BIA. While support in those specialized areas is needed, more fundamentally, we believe the BIA urgently needs staff with basic real property knowledge and TAAMS encoding capability.

Basic real property management and record keeping is the fundamental building block to energy development and many other areas of economic improvement. At the Southern Ute Agency, the BIA has been unable to fill two realty specialist positions that have been approved and vacant for many months, if not several years. The Superintendent and the Deputy Superintendent have essentially divided the duties of processing oil and gas leases and rights-of-way, and they have had to rely on one part-time individual for support in TAAMS encoding. To supplement that scant workforce, the Tribe has made available several individuals from its Department of Energy to assist in preparing documentation needed for final review and approval of energy related transactions; however, the Tribe does not have individuals with the advanced experience in TAAMS encoding needed to address the years of backlog that stand in the way of making the Tribe's real property records complete and current. As reflected in GAO's assessment of BIA's progress in workforce development, the BIA does not have the staff or the resources to implement a workforce planning system, not to mention the absence of resources needed to hire the employees needed to carry out trust functions.

**4. Providing Guidance on the Potential Scope of TERAs.** As part of the **Energy Policy Act of 2005**, Congress established an optional mechanism that permits qualifying Indian tribes interested in energy resource management to enter into Tribal Energy Resource Agreements with the Secretary that, under specified conditions, would allow a tribe to then enter into energy-related leases and business agreements, and grant energy-related rights-of-way, without prior BIA review or approval.<sup>10</sup> The implementing regulations for TERAs, found at 25 C.F.R. Part 224, establish the complicated process and detailed requirements for tribes to enter into and implement a TERA. Those regulations also allow tribes to assume administrative functions needed to oversee the activities undertaken under leases, business agreements, and energy rights-of-way approved by a Tribe following entry into a TERA; however, the regulations create an undefined regulatory exception to the scope of TERA, preventing a tribe from assuming "inherently Federal functions." This latter prohibition was not included in the statute enacted in 2005. Not surprisingly, no tribe has yet entered into a TERA.

As the 2015 GAO Report noted, one of the factors discouraging tribes from applying for a TERA, was the undefined limitation on the tribal assumption of "inherently Federal functions," which could potentially render entering into a TERA useless to a Tribe. GAO recommended that BIA provide specific guidance with regard to the scope of TERAs. BIA claims that an August

<sup>10</sup> 25 U.S.C. § 3504; Act of August 8, 2005, Pub. L. No. 109-58, Title V., § 503. The statutory provision addressing TERAs (25 U.S.C. § 3504) comprise a section of the "Indian Tribal Energy Development and Self-Determination Act of 2005," Title V of the Energy Policy Act of 2005.



31, 2017, half-page posting on the website of the Office of Indian Energy and Economic Development (OIEED) has met the concern raised by tribes in this regard,<sup>11</sup> and BIA reports that “[a]s a result, GAO closed Recommendation 5 on March 8, 2018.” BIA Testimony at 3.

Our Tribe disagrees with the BIA and the GAO that the OIEED posting provides any clear or meaningful guidance from the BIA as to the potential scope of a TERA. First, on its face the guidance applies to tribes with approved TERAs, of which there are none. Second, the guidance makes cryptic reference to contracts under the Indian Self-Determination and Education Assistance Act, as amended, Pub. Law 93-638, and states that the OIEED will consult with the Office of the Solicitor to determine what functions are contractible under 93-638. Of course, the unwillingness of the Office of the Solicitor to explain why the exception was inserted into the draft regulations in the first place and what it means, is what led to confusion about the scope of TERAs and their questionable usefulness to tribes. For a tribe such as ours that has seriously considered applying to enter into a TERA, the right to approve an oil and gas lease is much more appealing if the Tribe can also approve associated Applications for Permits to Drill, rather than have each such APD be subject to regulatory approval, NEPA approval, and potential federal administrative challenges.

## **VII. Barriers to Effective Indian Energy Development and Potential Solutions**

Our tribal leaders believe that weaknesses in the BIA management of Indian oil and gas resources contribute to a general preference by industry to acquire oil and gas leases on non-Indian lands over Indian lands. For example, the State of Colorado, which issues drilling permits on fee lands, typically issues a permit in approximately 45 days. If the permit is not issued within 75 days, the operator has a right to a hearing. In comparison, on tribal lands, BLM issues the permits to drill, which typically take four to six months to obtain. We recognize that the Department of the Interior and the BLM are working diligently to reduce those delays. In addition, permitting costs are much higher on tribal lands than on fee lands. The BLM’s drilling permit fee is \$9,500.00, and none of that money goes to the Tribe. In comparison, a state drilling permit in Colorado is free. These disparities create a comparative disadvantage that is exacerbated on reservations like the Southern Ute Indian Reservation, where tribal land and non-Indian fee land are arranged like a checkerboard, and oil or gas operators can develop on non-Indian fee land for less time and money, while potentially depleting Indian minerals.

Despite the Tribe’s decades-long success in managing its own affairs and conducting highly complex business transactions, both on and off of the Reservation, federal law and regulations still require federal review and approval of even the most basic realty transaction occurring on the lands held in trust for the Tribe on the Reservation. Federal involvement invariably delays a proposed tribal project. These delays are exacerbated by the fact that a federal approval often constitutes a federal action, which triggers environmental review under NEPA and other review requirements, even for simple and straightforward realty transactions. In essence, the Tribe’s

<sup>11</sup> U.S. Dep’t of Interior, Bureau of Indian Affairs, *DEMD and Office of the Solicitor guidance available to Tribes with an Approved Tribal Resource Agreement (TERA)*, [https://www.bia.gov/as-ia/ieed/division-energy-and-mineral-development/tribal-toolbox/de ...](https://www.bia.gov/as-ia/ieed/division-energy-and-mineral-development/tribal-toolbox/de...) (last visited July 10, 2018).

own lands are treated as public lands, and, if federal approval is involved, no action – not even some initiated by the Tribe itself – can occur until the federal government has analyzed the potential impacts, often after inviting comment from the public at large. In order to eliminate these delays and in recognition of the Tribe’s ability to protect its own interests and assets without assistance from federal agencies, the statutory and regulatory requirements for federal approval of tribal transactions must be modified so that federal review and approval of realty-related tribal projects is not required.

Fortunately, Indian energy legislation currently pending would address some of the inefficiencies in the TERA process. The Tribe strongly supports the “Indian Tribal Energy Development and Self-Determination Act Amendments of 2017” (S.245) and is hopeful it will be enacted into law this year. If enacted, S. 245 will go a long way in addressing some of the problems identified in this testimony by allowing electing tribes to make the choice to play a larger role in the energy development process and to require the United States to play a smaller role. This is a solution that could be achieved even despite federal funding and staffing shortages.

### **Conclusion**

Like other energy tribes, our Tribe’s economic prosperity is due in large part to responsible and sustainable energy development, and because of the Tribe’s energy resources, tribal members have access to education, health care, and employment benefits they would not likely otherwise have. Our Tribe, like many other tribes, is well-equipped to utilize our energy resources, particularly if given ever-increasing self-determination, and if limited federal resources are used to encourage those efforts rather than stifling them. We believe that this approach should be at the forefront of any Congressional oversight and action taken as response to GAO’s and OIG’s reports and analyses. The Tribe appreciates the continued efforts of this Congress, this Subcommittee, and others to encourage tribal self-determination through economic and energy development.

Mr. GIANFORTE. Thank you, Councilman.

And Mr. Henson, you are recognized for your five minutes of testimony.

#### STATEMENT OF ERIC CONRAD HENSON

Thank you. My name is Eric Henson. I'm a research fellow at the Harvard Project on American Indian Economic Development. And I work full time in an economics consulting firm out of Boston. I've done about 20-something years of tribal affairs, and I'm very happy to be here speaking with you today.

The Harvard Project started about 30 years ago with a very simple question. There is observation that some tribes that seem to have great natural resource endowments weren't quite taking off and doing so well. Poor socioeconomic outcomes. Other tribes, which had no apparent access to the kind of resources you might expect, would lend themselves to great economic outcomes, were doing just fine. So a couple of researchers at Harvard, I was only at high school at the time, so I was not there, set out in a rental car to kind of investigate this question. And these guys found over time that what really mattered were a couple of things that nearly sound self-explanatory today, but were kind of revolutionary at the time. Capable governing institutions on the part of tribes are really important.

You know, the word 'bureaucrat' or 'bureaucracy' kind of has a negative connotation sometimes. But in terms of government, someone needs to show up on Monday morning and keep the wheels of government working. And this applies to tribes no more or less than the Federal Government, states, municipalities. It is really important to have the right kinds of institutions in place.

Secondly, having a form of government that comports with the norms that the citizenry receives is the right way to govern the community is really important, and not every place has that. Lots of travel governments for a long time were kind of imposed by outside entities, and didn't square up with how the people thought about governing themselves at all.

And finally, most relevant to today, the single most important thing that was helping tribes grow their economies in a sustainable manner was self-determination, tribal sovereignty, putting the decision-making process in the hands of those, like the two gentleman next to me, who are right there on the ground.

Now what we found, and what I argue today, is that doesn't necessarily mean abandoning the U.S. Federal Government's responsibilities to the tribes. In fact, I would argue for a recommitment to that. Ms. Plaskett echoed this a little bit. There is no reason why tribal control or decision-making processes, sensible regulations, undoing multiple overlapping layers of unnecessary regulatory schemes, et cetera, et cetera, that doesn't have to be counter to the notion of providing the right kind of resources, if the Bureau of Indian Affairs, to take the most obvious example, is going to go out and attract dozens and dozens of highly technical employees over the next several decades. Which is going to be important, given the retirement numbers that are coming its way. Those people, you know, you're competing with private industry to lure people to places like the Durango, Colorado, area, and they are expensive.

And there are just some silly impediments to getting those people. There is a lack of local advertising for the right staff. There is this inability to just pay a cost-of-living adjustment to get the right people there. And it's also important to keep in mind, you're not going to necessarily lure someone to a remote location, be it the Virgin Islands or the Durango area, and have them start on day one as an expert. A lot of these jobs take decades and decades of expertise.

Now recommitting through the appropriations process to the right kind of staffing and funding for the BIA and all the other departments that oversee energy development is doubly important. Not only to put the right staff in place to interface with folks like Councilman Red and Chairman Not Afraid, but also, think about it, if you're in a place that's kind of remote, that faces brain drain, you have an underdeveloped economy, small population, the appeal of the big city is always there. You're trying to convince these people to devote their careers to a life in an energy development area that is often small population far from urban centers.

So the BIA, or other departments, can be a viable career alternative not just for outsiders, but for tribal citizens as well. At Crow there are plenty of people who could really benefit from a stable long-term governmental job. And that could be working hand in hand with the tribe in developing its energy resources.

And the last thing I'll say before I pass the mic is, you know, there are several legislative ideas out there that would impose, say, deadlines on the BIA, or other things of that nature. But imposing artificial deadlines without providing the right resources to meet those deadlines is not in service to Indian Country. Thank you very much.

[Prepared statement of Mr. Henson follows:]

Before the  
US House of Representatives  
Committee on Oversight and Government Reform  
Subcommittee on the Interior, Energy, and Environment  
Tribal Energy Resources: Reducing Barriers to Opportunity  
July 17, 2018

Statement of  
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I would like to take a moment to thank Chairman Gianforte, Ranking Minority Member Plaskett, Members of the Committee, and the Committee's staff for asking me to come down today and speak to you in beautiful Washington, DC. My name is Eric Henson, and I am an Executive Vice President at Compass Lexecon, which is an economic consulting firm. My firm has offices located around the world, but I primarily work out of the Compass Lexecon office in Boston, MA. My economic consulting work has included numerous projects involving oil and gas development, coal production, electric utilities, and the energy marketplace more broadly. A number of my consulting engagements have involved working with Native American tribes such as the Navajo Nation and the Crow Nation, both of which have substantial energy resources of the types we will be discussing here. I also serve as a Research Affiliate with the Harvard Project on American Indian Economic Development,<sup>1</sup> and in that position I am engaged in an ongoing effort to understand what makes tribal economies work best.<sup>2</sup> My academic work at Harvard includes serving as a Visiting Senior Scholar at the Harvard University Native

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<sup>1</sup> Referred to herein as "HPAIED" or "Harvard Project." The Harvard Project is based at Harvard's John F. Kennedy School of Government in Cambridge, MA. We partner with the Native Nations Institute, which is located at the University of Arizona in Tucson, AZ. The Native Nations Institute provides executive education and leadership programs, uniquely tailored to senior executives and managers within Native communities.

<sup>2</sup> See, e.g., The Harvard Project on American Indian Economic Development, *The State of the Native Nations: Conditions Under US Policies of Self-Determination*, New York: Oxford University Press, 2008.

American Program, and in that capacity I assisted in teaching a course entitled *Native Americans in the 21<sup>st</sup> Century* during the Spring 2018 semester. I am a citizen of the Chickasaw Nation, and I grew up in one of the country's great oil producing regions, the Permian Basin of West Texas.<sup>3</sup>

I have a Master's Degree in Public Policy from the John F. Kennedy School of Government at Harvard University, an MA in Economics from Southern Methodist University, and a BBA in Business Economics from the University of Texas at San Antonio. I attended Harvard as the Kennedy School's Christian Johnson Native American Fellow, finishing my studies at Harvard in 1998. I have been engaged in Indian affairs since graduate school; my Master's thesis at Harvard examined the importance of a uniform commercial code for economic development on the Crow Reservation. I have had the great privilege of visiting many of the tribal lands we will be discussing today.

### **THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT**

Since its inception in 1987, the Harvard Project has collaborated with Native Nations to understand how and why tribal economies, social institutions, and political systems either succeed or fail. At the Harvard Project, my colleagues and I undertake research and teaching specifically tailored to meet the needs of tribal communities and tribal leadership.

One of the major questions the Harvard Project has been grappling with is: How is it that, despite widely-cited poverty and social distress, which is prevalent across numerous American Indian reservations, more and more tribes have been able to cast off the bonds of external economic dependence? We have seen an increasing number tribes taking part in what we have often referred to as an "Indian Renaissance," where dynamic self-sustaining economies are created by tribal actions. These economies are built upon, and supported by, vibrant political and social institutions. The success stories are wide-ranging, from the property development and management of the Tulalip Tribes in Washington State, to sustained energy-based projects at Southern Ute, to the diverse array of professional and construction services offered by Ho Chunk, Inc. in Nebraska. Many tribes have begun actively challenging century-long economic paradigms and demonstrating effective self-determination and governance. It is curious that, contemporaneously, a number of other tribes experience continued economic hardship, high unemployment, rampant social and physical health challenges, and the like. What might be the causes of the striking economic and social divergences within Indian Country?

In the first years of HPAIED, the founding researchers recognized that what was needed in Indian Country was not additional unsolicited interference from outsiders, but culturally-

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<sup>3</sup> I appear today not as a representative of Compass Lexecon or Harvard University; the opinions herein are my own.

specific educational programs and research, developed for tribes, and undertaken hand-in-hand with tribal governments. The results of these studies are channeled back to those who must deal with the daily challenges of improving the economies and social conditions in Native communities (i.e., Indian people working in Indian Country).

In accordance with the above-mentioned approach, graduate students at the Kennedy School of Government, the Harvard University Native American Program, and at the Native Nations Institute (working in close coordination with tribes) have completed several hundred projects and field research reports, many of which were on matters specifically requested by the tribes. These field projects have ranged from welfare reform at the Navajo Nation to bison ranching at Cheyenne River, and from judicial reform at Hualapai to ski resort management for the White Mountain Apache. As part of our organization's mission, many of these reports are available to the public.<sup>4</sup>

Another important facet of the Harvard Project's work is our *Honoring Nations* program. *Honoring Nations* is a competitive awards program that identifies, celebrates, and shares outstanding success stories in tribal governance. We honor tribes that exemplify successful tribal governance; to date the Harvard Project has recognized tribal governmental programs ranging from the Eastern Band of Cherokee for their Tribal Sanitation Program (in 1999), to the Effective Law Enforcement Program of the Gila River Police Department (in 2003), to the Seniors Skilled Nursing Facility at the Tohono O'odham Hospice (in 2008), to the Tribal Fisheries Department at Nez Perce (in 2015). Since 1999, we have honored about 130 tribal governmental initiatives.<sup>5</sup> HPAIED remains committed to empowering Native Nations through identifying the common characteristics of tribes that are successfully charting a course towards a socially, culturally, politically, and economically healthy future.

The findings of the Harvard Project are widely disseminated and are generally well known by those with an interest in Indian affairs, so I will not belabor the research here. Instead, I provide a brief summary. Prior to the 1980s, there was a notable lack of research pertaining to economic development in Indian Country. The small amount that was available contained at least two consistent themes. First, the overriding focus was on what the federal government could do to create jobs, raise income, and increase household wealth. This helped contribute to the unbalanced relationship between the Bureau of Indian Affairs ("BIA"), other federal programs, and the tribes, which often became dependent on federal funding and expertise. Second, the federal policies and programs that did exist within Indian Country constituted what we refer to as a "Planner's Approach" to economic and community development. The Planner's

<sup>4</sup> See, e.g., the Harvard Project website at <http://www.hpaied.org/>.

<sup>5</sup> For more recent examples, see "Celebrating Excellence in Tribal Governance, Honoring Nations 2016 Awardees," The Harvard Project on American Indian Economic Development, on the Harvard Project website at <https://hpaied.org/sites/default/files/documents/HN%202016%20Final%20Report%5B1%5D.pdf>.

Approach was simplistic in treating economic development as a fundamental question of resources and expertise, as opposed to one of incentives and institutions.

A fundamental flaw of the Planner's Approach was the erroneous assumption that a nation's economic development is a mechanical process that can be achieved by imposing a predetermined blueprint. While it is advisable and even advantageous to plan ahead, it is an exercise in hubris to think that one can "plan" an economy, in the sense of expecting tribal councils, national legislatures, or federal planners to correctly select a portfolio of businesses, projects, and activities that will not only survive, but meet the needs of tribal citizens, and thrive over time.<sup>6</sup>

The discussion above raises one obvious question: If one cannot "plan" an economy to arrive at productive and sustainable development, what is the alternative? While there is no predetermined blueprint for success, there are some general tenets for effective, long-term economic development, and these tenets are now being demonstrated by a large number of tribes in Indian Country. We have found that these tenets of sustainable development are applicable to developing nations the world over, and are being acted upon by many successful tribes in Indian Country. The tenets that matter can be summarized as institutions, culture, and sovereignty.

**Institutions Matter:** The nature of a society's institutions, whether social, cultural, and/or governmental, determines the incentives around productive or unproductive activity. Research has demonstrated that successful economic development turns on a tribe's institutions operating under: (i) a rule of law (i.e., a respect for tribal law and the establishment of legitimate means for dispute resolution); (ii) a separation of politics from day-to-day administration and business affairs (i.e., enterprises and economic transactions are free from societal politics and power struggles); and (iii) an efficient bureaucracy (i.e., clarity of procedures, good record-keeping, efficient administration processes, reliable computer networks, and the like).

**Culture Matters:** Given the importance of institutions within a society, the social norms and worldview of the citizens that interact with those institutions also matter.<sup>7</sup> For governing institutions to provide the foundation upon which sustained economic development can take

<sup>6</sup> Consider the natural experiment of the German economies after World War II. The parts of former Germany subjected to market forces (i.e., West Germany) became a powerhouse of development in post-war Europe. The parts of former Germany subjected to centralized planning (i.e., East Germany) stagnated and the citizenry had to be forcefully restrained from leaving for better opportunities elsewhere. For a discussion in the context of Indian Country, see the US Senate, Senate Committee on Indian Affairs, *Forum on Establishing a Tribally Owned Development Corporation*, September 20, 2004, Statement of Joseph Kalt, noting that "Economic development is an organic process. In an environment in which opportunities are subject to the vicissitudes of competition and continually changing marketplace conditions, economic development occurs as the sum of small, adaptive decisions of myriad individuals who by luck or preparation are in the right place at the right time to take advantage of unplanned prospects. Economic development is much more analogous to tenacious plants looking for places to pop up and take root, than to an engineered system."

<sup>7</sup> See, e.g., Miriam Jorgensen, *Bringing the Background Forward: Evidence from Indian Country on the Social and Cultural Determinants of Economic Development*, Doctoral Dissertation, May 2000, at page 129.



place, there first should be a “cultural match.” One can think of cultural match as the consonance between the structure of a society’s formal institutions of governance (and its economic development initiatives) and its underlying norms of political power and authority. In order to function effectively, a society’s institutions and corresponding economic development must be consistent with underlying cultural, political, and organizational norms. Simply put, they must be seen as legitimate in the eyes of the society’s citizenry.

**Sovereignty Matters:** Self-determination is critical in Indian Country and its importance to economic development cannot be overlooked. There are at least four inseparable issues connecting sovereignty and self-determination to economic and community development that must be kept in mind: (i) without self-determination, it is impractical (and perhaps impossible) to change institutions so that they more closely match those of Native Nations and their unique economic needs; (ii) absent a strong sense of ownership, it is unquestionably difficult to get a local community involved and interested in the payoff from tribal economic investments; (iii) accountability is critical, as those making the investments and program decisions need to be held accountable for how all tribal resources are used; and (iv) leadership matters in all political settings, including tribal (an increasing number of astute, capable, and highly experienced leaders are emerging within Indian Country).

After years of research, it has become clear that tribes must have autonomy in order to foster institutions that are a cultural match for their societies. Successful tribal governments all exhibit this pairing of institutions and a cultural match. This is why policies of sovereignty and self-determination have been the only strategy that has shown any prospect of breaking the patterns of poverty and dependence that became so familiar on reservations from the late 1800s until at least the 1990s. It is only logical that it requires self-rule for a culture to put in place institutions that are a cultural match. Thus, we can restate the uniform qualities that have marked successful economic development in Indian Country as aggressive assertions of sovereignty, resulting in self-governed institutions that are characterized by a cultural match. It has repeatedly been shown that, when a tribe takes control of its institutions and runs them in congruence with its own cultural norms, the result is a set of economic, social, and political systems that work for its citizens.<sup>8</sup> Continued dependence on the federal government removes accountability for tribal leadership and undermines the processes necessary for stable and lasting economic development. The negative results of such dependence should not be surprising.

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<sup>8</sup> Stephen Cornell and Joseph Kalt, “Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations,” *Joint Occasional Papers on Native Affairs*, 2003, No. 2003-02.

### ENERGY DEVELOPMENT ON NATIVE AMERICAN LANDS

Energy development is an important goal for a number of tribes, and granting them the ability to capitalize on their own resources without federal impediments will go a long way toward improving socioeconomic conditions for tribal governments and many individual Indians. This is evidenced by the significant gains in wealth for those tribes who have been able to develop and operate their own energy projects and by the significant losses for those tribes whose efforts have been stymied by the current federal system's failure to properly oversee these important energy initiatives. Streamlining energy development and minimizing inefficient federal oversight will empower tribes to control their own lands in a more effective and beneficial manner. At the same time, it is important to proceed with regulatory reform or new legislation in a way that maintains the trust responsibility held by the US government toward the tribes. The goal is not to upend the balance of responsibility but to create a more optimal business environment for the tribes that want to develop energy projects and to help them benefit from the resources located on or beneath their own lands.

I last provided testimony in the House of Representatives on energy development issues in October of 2016.<sup>9</sup> In that testimony, I addressed the importance of furthering Native American economic development and reducing federal dependence by looking at the socioeconomic conditions of Native American tribes. I have updated some of the data presented in that hearing, and these analyses are attached hereto. As shown in Figures 1 and 2, the annual per-capita and median household incomes of Native Americans have been consistently and significantly lower than the US average. In the period ending 2016, Native Americans had an average real per-capita income of \$18,239, compared to the national average of \$30,366 (see Figure 1). At that same time, real median household income for Native Americans was 30% below the US average. Family poverty levels reflect this same shortfall in socioeconomic conditions: the percentage of Native American families living below the poverty line has consistently been more than double the US average (this holds for the recent time periods for which data are available, i.e., from the late 1990s through 2016 (see Figure 3)). A likely contributing factor to these disparities is that the employment rates for many tribes, including some of the energy-producing tribes, lag behind the national average. As of 2015, the select tribes presented had, on average, employment rates at only 83% of the rate observed in the United States as a whole (see Figure 4). Poor socioeconomic outcomes such as these persist across energy-producing tribes. Consider, for example, the Blackfoot tribe, the Tohono O'odham tribe, the Navajo Nation, and the Crow Nation; all are endowed with substantial natural resources. Unemployment rates for these tribes are consistently much higher than the national average across the United States (unemployment data from 2009 to 2016 are shown in Figure 5).

<sup>9</sup> Statement of Eric Conrad Henson, *Tribal Prosperity and Self-Determination through Energy Development, Before the US House of Representatives, Committee on Natural Resources, Subcommittee on Indian, Insular, and Alaska Native Affairs*, October 4, 2016 (see also the data figures presented with the testimony).

In 2014-2016, the unemployment rate gap was the highest shown (at 13%); in 2009 the divergence in unemployment rates was “merely” 8%.

It is striking that these socioeconomic conditions were (and are) present on these reservations, despite the tribes’ abundance of valuable and accessible natural resources. The wealth of available resources available to select tribes is detailed in Figure 6. Data for all tribes indicate that Indian lands hold almost 30% of the nation’s coal reserves west of the Mississippi, 50% of potential uranium reserves, and 20% of known oil and natural gas reserves.<sup>10</sup> These resources are estimated to be worth approximately \$1.5 trillion.<sup>11</sup>

In addition to coal, uranium, oil, and gas, tribal lands also hold large potential renewable energy resources. Wind, solar, geothermal and hydroelectric energy are all accessible in many tribal areas, but relatively few examples exist to demonstrate successful development of renewable energy supplies. For example, the US Department of Energy notes that “Overall, the analysis shows that the technical potential on tribal lands is about 6% of the total national technical generation potential. This is disproportionately larger than the 2% tribal lands in the United States, indicating an increased potential density for renewable energy development on tribal lands.”<sup>12</sup> The potential that tribal energy development represents is largely untapped; the Department of the Interior indicates that only 2.1 million acres of Indian lands are being developed for their energy resources, while an additional 15 million acres with energy potential remain undeveloped. In other words, 88% of Indian surface lands have resources that could provide tremendous economic and social benefits to a number of tribes, but have yet to be developed.<sup>13</sup>

Our meeting today is focused on potential actions that could reduce barriers to energy developments on tribal lands. This is an important topic because, by any measure, the potential resource base found on tribal lands is substantial, and there is a long history of tribes pointing out that federal regulations often impede development efforts. Untapped energy assets offer significant and unique prospects for individual Indians, as well as entire tribal communities, to generate important revenue streams and achieve higher socioeconomic standards. If tribes choose to pursue energy development, they can see benefits from energy development such as well-paying jobs and substantial royalty and tax revenues flowing to tribal coffers. These royalty and tax revenues can then be used to ensure greater access to critical healthcare services, upgrade the often deplorable housing stock found on tribal lands, and expand a host of other important

<sup>10</sup> Shawn Regan and Terry L. Anderson, “Unlocking the Wealth of Indian Nations: Overcoming Obstacles to Tribal Energy Development,” Property and Environment Research Center, February 2014 (hereinafter referred to as “PERC Report”) at page 4.

<sup>11</sup> PERC Report at page 4.

<sup>12</sup> E. Doris, A. Lopez and D. Beckley, “Geospatial Analysis of Renewable Energy Technical Potential on Tribal Lands,” US Department of Energy, February 2013, at pages 1-2.

<sup>13</sup> PERC Report at page 8.

social services. If these resources remain effectively inaccessible to tribes, then what is already a set of complex and difficult socioeconomic challenges facing the most economically disadvantaged people in the country could easily degrade further.<sup>14</sup>

In my review of recent actions relating to tribal energy development, a common set of challenges consistently comes to light. These challenges are noted in a GAO report from February 2017 aiming to improve the federal management of tribal programs.<sup>15</sup> The GAO finds that federal agencies such as the BIA have mismanaged and hindered the development of Indian energy resources in at least the following key areas: inadequate oversight of federal activities such as the BIA's review process for energy leases and appraisals, ineffective collaboration and communication, limited workforce planning, outdated technology and infrastructure, and incomplete and/or inaccurate data/data systems.<sup>16</sup>

Energy development on Indian lands has frequently been hindered by federal requirements that call for BIA review and approval of energy projects. Much of this stems from the lengthy and opaque nature of the review process that is employed by the BIA. For example, the GAO found that the BIA did not have a documented process or the data required to track its review and response times for energy leases and appraisals. As a result, several tribes have missed energy development opportunities and their associated revenue streams. Consider just a couple of examples.

- In 2011, the Rosebud Sioux Tribe reported that they had been prepared to move forward with a shovel-ready wind project since 2008, but due to the BIA taking 18 months to review the necessary lease, the project had been unduly delayed and had lost its pre-arranged interconnection agreement with the local utility.<sup>17</sup>
- In April of 2014, the Southern Ute reported that of 81 pipeline right-of-way agreements up for renewal, 11 had been under review by the BIA for eight years, and the rest had been under review for at least five years, resulting in approximately \$95 million of lost revenue to the Tribe.<sup>18</sup>

<sup>14</sup> Maura Grogan, Rebecca Morse and April Youpee-Roll, "Native American Lands and Natural Resource Development," Revenue Watch Institute, 2011, at pages 6-7.

<sup>15</sup> *High Risk Series, Progress on Many High-Risk Areas, While Substantial Efforts Needed on Others*, United States Government Accountability Office, February 2017 ("GAO High Risk Series").

<sup>16</sup> GAO High Risk Series at pages 214-217.

<sup>17</sup> *Indian Energy Development: Poor Management by BIA Has Hindered Energy Development on Indian Lands*, United States Government Accountability Office, June 8, 2015 (hereinafter referred to as "GAO June 2015 Report") at pages 21-22; Testimony of Rodney M. Bordeaux, *Hearing on Regulatory Barriers to American Indian Job Creation*, 112th Congress, April 7, 2011.

<sup>18</sup> Statement of Frank Rusco, United States Government Accountability Office, *Federal Management Challenges Related to Indian Energy Resources*, Before the Subcommittee on the Interior, Energy, and Environment, Committee on Oversight and Government Reform, House of Representatives, February 15, 2017 at page 5.

One of the major hurdles to approval of energy leases and appraisals has been the BIA's antiquated Trust Asset and Accounting Management System ("TAAMS").<sup>19</sup> The GAO has issued several reports containing recommendations for improved tracking and monitoring of the BIA's review and response times,<sup>20</sup> and the BIA has initiated data-tracking enhancements to TAAMS. My understanding is that these improvements are currently under development.<sup>21</sup> It is critical that the BIA ensures timely completion of these improvements, as it is not feasible to increase the efficiency of the review process without reliable and complete data on such fundamental matters as (i) the dates documents are received, (ii) the dates of completion of the review process, and (iii) the dates applications receive approval or denial.<sup>22</sup>

Another issue contributing to stymied Indian energy development is the BIA's lack of workforce planning and the skill gaps that result from insufficient human resources. The dire staffing situation is illustrated by the fact that the BIA estimates a gap of 33 to 50 engineers, engineering technicians, and environmental scientists working in a trust capacity. Of the current professionals in this capacity, 59% are eligible for retirement within the next five years.<sup>23</sup> Due to staffing shortages in the Southern Ute Agency, the Southern Ute Tribe has had to enter into contractual agreements to provide tribal staff (paid with tribal funds) to support federal functions undertaken by the regional office.<sup>24</sup> While the BIA has undertaken steps to identify its workforce issues and is purportedly working towards a workforce plan,<sup>25</sup> the organization likely does not have the capacity and resources to address its staffing needs.<sup>26</sup> In addition to lacking sufficient staff proficient in energy-related matters, there have also been high levels of turnover in leadership positions among a number of the agencies that oversee energy projects on Indian lands. Examples of staffing shortages that affect Indian energy activities are the lack of a

<sup>19</sup> Prepared Statement of Honorable Tyson Thompson, *Examining Federal Programs that Serve Tribes and Their Members, Before the Committee on Oversight and Government Reform, Subcommittee on the Interior, Energy, and Environment, United States House of Representatives*, February 15, 2017 (hereinafter referred to as "Thompson Testimony") at page 3.

<sup>20</sup> *Indian Energy Development: Additional Actions by Federal Agencies are Needed to Overcome Factors Hindering Development*, United States Government Accountability Office, November 10, 2016; *Indian Energy Development: Interior Could Do More to Improve Its Process for Approving Revenue-Sharing Agreements*, United States Government Accountability Office, June 13, 2016; GAO June 2015 Report.

<sup>21</sup> Testimony of Darryl LaCounte, *Before the Committee of Indian Affairs, US Senate*, June 13, 2018 (hereinafter referred to as "LaCounte Testimony") at page 2.

<sup>22</sup> GAO High Risk Series at page 214.

<sup>23</sup> LaCounte Testimony at page 6.

<sup>24</sup> Thompson Testimony at page 8.

<sup>25</sup> LaCounte Testimony at page 6.

<sup>26</sup> Statement of Frank Rusco, United States Government Accountability Office, *Agencies Need to Continue Efforts to Address Management Weaknesses of Federal Programs Serving Indian Tribes, Before the Committee on Indian Affairs, US Senate*, June 13, 2018 (hereinafter referred to as "Rusco 2018 Testimony") at page 10.

permanent Director at the BIA and the lack of a permanent Director or Deputy Director at the Office of Trust Service.<sup>27</sup> Without stable leadership and qualified staff, the BIA will continue to contribute to delays for energy projects on tribal lands; if there are insufficient numbers of professional personnel equipped to review and approve the projects in question, the barriers we are discussing today will not be overcome.

The GAO also identified data limitations and outdated technology as some of the BIA's management weaknesses relating to tribal energy development. Until August 2017, the BIA did not have integrated geographic information system ("GIS") mapping technology critical to identifying the owners and users of resources (this included insufficient information on who held energy leases).<sup>28</sup> Additionally, the federal cadastral surveys that define, divide, trace, and record land have periodically been missing or outdated. These surveys, in combination with the GIS data, are critical to determining ownership, which is a basic requirement before the BIA can approve leases or other energy-related applications.<sup>29</sup> In the past, tribes have been hindered by these issues, or have had to put up substantial resources of their own to work around them. For example, the Crow Nation has reported that BIA's records for surface and mineral ownership are repeatedly missing or out-of-date.<sup>30</sup> The Southern Ute have also reported gross mishandling of historical trust and realty records at the Southern Ute Agency; this has led the Tribe to spend more than \$1 million of tribal funds to scan and index the BIA's archival files. These data were then imported into the Tribe's own proprietary GIS software.<sup>31</sup> Within the last year, the BIA claims it has made significant progress towards improving these data and technology issues. The BIA integrated GIS map-viewing technology, established a database along with the BLM to identify ownership, and developed a mechanism for new survey requests. While this all sounds promising, it remains to be seen if these improvements will be sufficient to resolve the BIA's data issues and technological inefficiencies.

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<sup>27</sup> Rusco 2018 Testimony at page 8.

<sup>28</sup> LaCounte Testimony at page 1.

<sup>29</sup> GAO High Risk Series at page 217.

<sup>30</sup> See, e.g., *On Improving Tribal-Corporate Relation in the Mining Sector: A White Paper on Strategies for Both Sides of the Table*, HPAIED, April 2014, at <https://hpaied.org/sites/default/files/documents/miningrelations.pdf>, at page 91.

<sup>31</sup> Thompson Testimony at page 7.

## RECOMMENDATIONS AND CONCLUSION

As of early 2017, the GAO recommended improvements to enhance energy developments on tribal lands in a number of broad areas. Streamlining the review and approval process and addressing workforce/staffing needs should go a long way towards promoting energy development on tribal lands and would likely address many of the broad areas GAO has highlighted for improvement.

- One of the more promising reforms enacted by Congress relating to energy initiatives in Indian Country is the *Helping Expedite and Advance Responsible Tribal Homeownership Act of 2012* (“HEARTH”). HEARTH provides a model which is helping tribes accelerate the leasing of tribal surface lands.<sup>32</sup> My understanding is that HEARTH has as its foundation ideas that were articulated in earlier limited legislation authorizing tribes such as the Navajo Nation to independently lease surface lands without Secretarial approval for each individual lease; HEARTH extended these rights to all tribes.<sup>33</sup> However, HEARTH does have its limitations. In the context of energy development, HEARTH allows for projects that lease only surface land and does not extend tribal leasing authority over subsurface extraction or exploration. Energy projects on surface lands are often renewable energy projects, such as utility-scale solar or wind farms. It is promising that under HEARTH tribes can implement their own regulations governing the leasing of Indian lands. This includes for renewable energy development, but such projects have yet to be widely adopted. For example, as of March 2015 only one utility-scale wind facility was in operation on tribal land, with one more such facility and one utility-scale solar facility under construction at that time.<sup>34</sup> This is in stark contrast with the significant developments in utility-scale wind and solar capacity in the United States. Data indicate that in the decade between 2004 and 2013, 686 utility-scale wind projects and 778 utility-scale solar projects were constructed nationally.<sup>35</sup> This difference between renewable capacity added nationally and on tribal lands illustrates the need to create further provisions for tribes to develop their energy resources.

<sup>32</sup> HEARTH does not cover subsurface leasing or the ability to grant rights-of-way (Code of Federal Regulations, Title 25 – Indians, at §162.006(b)(1)).

<sup>33</sup> Monte Mills, “New Approaches to Energy Development in Indian Country,” *The Federal Lawyer*, April 2016 (“Mills 2016”) at page 53. Under HEARTH, the Pueblo of Sandia was the second tribe (after the Federated Indians of Graton Rancheria) to be approved for tribal regulations on their land (US Department of the Interior, “Secretary Salazar Signs Historic Agreement in New Mexico to Help Spur Economic Development in Indian Country,” March 14, 2013). The Governor of the Pueblo, Victor Montoya, said at the time he expected HEARTH to aid with elimination of red tape and quicker negotiations with companies looking to lease land. With the help of HEARTH, the Pueblo has been working to develop its airport and improve its retail center (*Albuquerque Journal*, “A ‘historic day’ at pueblo,” March 15, 2013).

<sup>34</sup> GAO June 2015 Report at page 2.

<sup>35</sup> GAO June 2015 Report at page 3.

- Another proposed measure aimed at facilitating energy development on Indian lands is the *Native American Energy Act* (HR 210). This pending legislation sets out to reduce the time required for the approval process for leases and provides tribes with the option to waive appraisals. For example, imposing binding time limits on the appraisal and approval processes could significantly speed up the time taken to greenlight a project and prevent bureaucratic delays.<sup>36</sup> As the examples provided above indicate, tribal energy development projects that have been stymied in the past have caused significant economic damages to tribes, and have led non-tribal industry participants to develop increased skepticism when considering tribal development initiatives in the energy sector. Streamlining the federal appraisal process (or forgoing it altogether, as contemplated by HR 210) would make it easier for tribes to undertake energy development in pursuit of tribally-driven economic development and determination.<sup>37</sup>
- Other options to alleviate the congestion at the BIA include the possibility of administering block grants for tribes to take over their own appraisals, regulation enforcement, and energy administration, including for lands held in trust by the federal government. In discussions I have with tribes engaged in energy development, the idea of block grants, or funding being turned over directly to certain tribes to carry out functions typically performed by the BIA, is largely well-received as a potential way to improve efficiency in tribal leasing for energy development. These types of grants could provide a given tribe with a fixed amount of funding for the tribe to hire third-party appraisers, to hire experts to assist in negotiating agreements with outside investors and developers, and to review royalty rate provisions and distribute royalty payments.<sup>38</sup> Consider the bottleneck that the appraisal process has often become. By giving tribes funding to cover appraisal costs themselves, the BIA's backlog in reviewing lease and appraisal applications, and the financial burden of increasing its own staffing, could be alleviated.

In addition to streamlining the review and approval process, there are steps that can be taken to help improve BIA's workforce issues. These include:

- First, the resources available for staffing the BIA should be dramatically increased. The US Government, through its appropriations process, should fund the BIA and all other federal departments responsible for development of tribal

<sup>36</sup> It is important to note that arbitrary time limits without sufficient funding to take on BIA's resource shortcomings is not a solution that best balances tribal needs for economic development with the ongoing trust responsibilities of the United States.

<sup>37</sup> Mills 2016 at page 57; National Congress of American Indians, "Policy Update, 2016 Mid-Year Conference," 2016, at pages 13-14.

<sup>38</sup> US Department of the Interior, "Tribal Grant Program to Assess, Evaluate and Promote Development of Tribal Energy and Mineral Resources."



energy assets to the fullest.<sup>39</sup> The BIA is not always able to aid tribal energy development to the best of its capabilities, but the Bureau is extremely important for the administration and management of tribal lands held in trust by the federal government, and its smooth and timely functioning is essential for tribes with energy resources. An understaffed and overburdened BIA impedes tribes from capitalizing on their own resources. In discussions I periodically have with those working on the ground in energy development for tribes, I hear differing views on the BIA's role. I have found a number of instances where a lack of funding, staffing, and expertise at the BIA acts as a roadblock to the timely energy development that tribes seek; but I have also been told that there are instances where tribes look to the BIA for its built-in expertise and assistance in leasing oil and gas properties, and that area BIA offices work well.<sup>40</sup> As tribal experiences with the BIA are not positive across the board, it is important to reduce inefficiencies and streamline the BIA's approval and appraisal process. This can be accomplished by using federal appropriations to provide the BIA with more of the funding it needs to increase its staff and expertise and by providing incentives for quick and timely action by existing BIA offices.<sup>41</sup>

<sup>39</sup> Consider the staffing available for the US State Department relative to that of the BIA. As is well known, the State Department is tasked with liaising with approximately 200 foreign nations. To do so, the State Department employs more than 76,000 people (US Department of State, Bureau of Human Resources, "HR Fact Sheet," March 3, 2018) and has an annual budget on the order of \$40 billion (US Department of State, "Congressional Budget Justification, Fiscal Year 2019," February 12, 2018, at page i). The BIA is also in charge of important inter-governmental relationships. In the case of the BIA, the Bureau is tasked with interfacing with nearly 600 Indian nations, and is expected to do so with a staff of about 4,500 individuals (US Department of the Interior, Indian Affairs, "Shutdown Contingency Plan," January 2018, at page 3). The BIA has an annual budget of about \$2.5 billion (US Department of the Interior, "Fiscal Year 2018, The Interior Budget in Brief," May 2017, at page BH-77). Of course, the BIA is part of the Department of the Interior, and so is not strictly comparable to the State Department. Nonetheless, as these data indicate, the US State Department has staffing and funding resources greatly in excess of what is available to the BIA.

<sup>40</sup> Note that the positive BIA feedback I have heard over the past couple of years involves energy leases on tribal lands that are not reservation lands. However, this does not invalidate the important point that tribes and their situations are extremely diverse, and blanket solutions have seldom proven useful in Indian Country. As one legal scholar points out: "The basis of Federal Indian energy policy should be a recognition that each tribe can propose how best to oversee and regulate or restrict development and then, with appropriate federal support, build or enhance the governmental institutions necessary for doing so. In negotiating the details of each such proposal, then, the federal government could work with the tribe to identify how tribal property and interests will be best protected, but importantly, neither the tribal nor the federal government should be bound to a specific regulatory scheme. Instead, with federal support, assistance, and, potentially, co-management, tribal governments will be able to develop their own energy policies, laws, rules and regulations as they see fit." (Monte Mills, "Beyond a Zero-Sum Federal Trust Responsibility: Lessons from Federal Indian Energy Policy," *American Indian Law Journal*, Volume 6, Issue 1, December 15, 2017 (hereinafter referred to as "Mills 2017") at pages 87-88, especially 88.)

<sup>41</sup> Legal scholar Monte Mills notes (Mills 2017 at page 79) that the federal government's responsibilities to the tribes are substantial and should supersede politics: "Indian policy ... demands consideration in a non-partisan manner. The federal government's trust responsibility to Indian Country is not the product of a liberal or conservative agenda; rather, it is rooted in the foundation of the constitution and federal law." Over the course of its history, the US has rightfully been proud of its commitment to meeting its contractual obligations. As this quote illustrates, the treaty and trust responsibilities of the federal government are more substantial than

- Second, additional measures that could alleviate the BIA's staffing shortage consist of advertising local office positions locally, providing cost-of-living adjustments for staff that must move from one locale to another to take on a position with the Bureau, and creating programs to train new employees.<sup>42</sup> Local advertising helps generate candidates for positions, cost-of-living adjustments for local positions in expensive areas will help attract critical energy-related staff to vacant positions, and training programs will contribute to increased efficiency and staff retention. These are very common sense steps that should be made part of the BIA's human resource initiatives.
- Third, the block grants discussed above should be part of the tools available to the BIA to foster tribal energy development. To the extent tribes are willing and able to use such funds to undertake components of energy development that currently fall to the federal government, these grants can only help to ameliorate some of the burdens currently falling on BIA staff. If tribes are given funding to carry out tasks that are typically under the BIA, such as appraisals, there will be a reduced backlog and reduced demand on constrained BIA personnel and resources.<sup>43</sup> The Southern Ute's work on indexing the BIA's trust and realty records into their own GIS software (albeit undertaken with tribal funds) is an example of how empowering tribes to take on tasks that are typically carried out by the BIA can be successful and efficient.

For many involved in energy development on tribal lands, efforts that look to streamline energy development on tribal lands by decreasing federal oversight and regulation are welcome. Lessening the need for inefficient or redundant regulation and oversight promotes tribal autonomy and self-governance, and as the Harvard Project research indicates, successful tribal development depends crucially on enhanced tribal decision-making authority over governmental

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contractual obligations; the roles and duties assumed by the United States were freely taken on by the federal government and are owed to the tribes.

<sup>42</sup> Thompson Testimony at page 8.

<sup>43</sup> A measure recently undertaken by the Department of the Interior to assist with energy development was to establish the Indian Energy Service Center ("IESC"), which was designed to speed up energy leasing, permitting, and reporting (see, e.g., Testimony of Mary L. Kendall, *Before the US House of Representatives, Committee on Oversight and Government Reform, Subcommittee on the Interior, Energy, and the Environment*, February 15, 2017 (hereinafter referred to as "Kendall Testimony") at page 4). The IESC was intended to increase coordination and management across numerous federal regulatory agencies, and to implement streamlined processes, standard procedures, and best practices, which would also help alleviate staffing burdens faced by federal employees working on tribal energy development (Kendall Testimony at page 4; GAO High Risk Series at page 214). It is unclear if the IESC will meet its goals; such "one-stop shops" might prove to be beneficial, but there are also potential drawbacks to consider. If not executed properly, these shops might exacerbate existing bottlenecks to energy development by simply consolidating them into one location, such as Denver. Offices of this type may also draw experienced technical advisers away from field offices where those personnel might have made a greater impact working more directly with the tribes located nearer the area offices. However, if the IESC can establish itself as the single point and lead agency of contact throughout the regulatory process by including agencies such as Fish and Wildlife and the US Army Corps of Engineers it has the potential to lessen impediments to tribal energy development (see, e.g., LaCount Testimony at page 4).

and economic policies that affect tribal lands and resources.<sup>44</sup> Promoting opportunities for tribal self-determination and governance is something the federal government has tried to do over the last several decades, but has largely fallen short of in regard to energy development.<sup>45</sup> The efforts I have described here can help promote the development of Native American energy resources, resulting in benefits to Native Nations and individual tribal citizens, through both enhanced economic development opportunities and more efficient exploitation of the energy resources we are all collectively fortunate to have within the boundaries of the United States. Clearly, this is an issue that is worthy of serious consideration by the US Congress, and I thank you for allowing me to take part in this important discussion.

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<sup>44</sup> Stephen Cornell and Joseph P. Kalt, "Two Approaches to Economic Development on American Indian Reservations: One Works, the Other Doesn't," *Joint Occasional Papers on Native Affairs* No. 2005-02, 2006, at pages 14-15.

<sup>45</sup> The story of the Southern Ute tribe seizing control of its own energy development is well known and provides a useful example of how allowing tribes to develop and control their own resources can be tremendously successful. Through its Red Willow Production Company, which is owned and operated by the Southern Ute tribe in Colorado, the tribe engages in oil extraction in a number of geographic areas and produces throughout the Western US and offshore in the Gulf of Mexico. Red Willow is but one of five energy companies operated by the Southern Ute tribe, and the success of the tribe's energy endeavors has allowed it to create a growth fund worth billions of dollars, and to provide sizeable dividends to the tribe's citizens over a number of years (see, e.g., PERC Report at pages 17-18).

Mr. GIANFORTE. Thank you, Mr. Henson.

And now we will recognize Mr. Deschene. Is that correct?

Mr. DESCHENE. Yes, sir.

Mr. GIANFORTE. Yes. Please go ahead. You have five—you are recognized for five minutes.

#### STATEMENT OF CHRISTOPHER CLARK DESCHENE

Mr. DESCHENE. Thank you. [Speaking native language.] Good morning, Chairman Gianforte, and Ranking Member Plaskett, members of the committee. My name is Christopher Clark Deschene. I'm a member of the Navajo Nation, and a partner with Rosette, LLP, which is a national tribal law firm. I'm here also with Councilman Leon Reval from the Jicarilla Apache Nation, Northern New Mexico.

As a member of the—excuse me. As a former director for Indian Energy at DOE, I'm here to share my thoughts and recommendations for improving tribal energy development within Indian Country. As my people say [Speaking native language.], which means 'educate them all.'

With regards to the policy challenges, there are four general reasons underlying tribal energy issues, and undermining the federal tribal energy policy. These are: One, the Federal Government's antiquated land policies; two, federal courts' use of judiciary plenary power; and three, the inability of Congress to pass comprehensive tribal energy legislation, and dedicate adequate resources; four are the paternalistic, inefficient, and archaic bureaucracy of the Executive Branch and its agencies.

With respect to Congress, congressional elections over the last 12 years have hurt Indian energy development. Tribal energy bills designed to continue the work started under Title V of the Energy Policy Act have all stalled due to inaction. Similarly, at the Executive, there are a number of policies that also have encumbered energy development. These include inadequate staffing and support for project reviews and key energy positions. Federal agencies have also minimized the budget needed to provide adequate and meaningful services and financial support through tribal energy development programs.

Changing the tribal energy paradigm requires tribal resources, including water, land, minerals, and labor to help solve our country's energy challenges. Tribal leaders have always argued that they must be part of the equation in solutions offered by our country's energy industry. Accordingly, tribal leaders have recommended the following, and based upon my observations, Congress should continue tracking the implementation of the GAO report recommendations from the '15, '16, and '17 reports. Congress should also consider passing national tribal energy legislation that updates, amends, and supports tribal leadership recommendations.

The Hearth Act should be amended to allow tribes to approve leases and easements for tribal energy development. At the Department of Energy, Congress should consider and fund the Office of Indian Energy at DOE, at, and this is a big ask, \$100 million for 25 full-time employees. That office has been charged with national service, and is operating at a substandard level, with less than four

employees at times. Congress should also look at creating a Senate-confirmed Assistant Secretary of Indian Energy at DOE as well.

Additionally, Congress should allocate and authorize funds for the Tribal Energy Loan Guarantee Program at a minimum of \$100 million. I know that the former senator from Minnesota had looked at this effort. That should be picked up again as well.

Finally, Congress should look at tribal energy partnerships by supporting DOE's Office of Indian Energy's Strategic Roadmap 2025 that enumerates a number of goals, including the buildout of tribal businesses and their roundtables to help foster tribal energy development from the industry. With regards to the Administration, again, the GAO reports are instructive. They should also look at the implementation of five- to ten-year budget plan with regards to funding for DOE and DOI, with OMB.

Given that my time is running short, I'd like to just talk a little bit about policy as well. With regards to policy, the Federal Government should look at funding agency programs throughout the government. Programs that build tribal capacity, education, and workforce development are important. With regards to transmission, planning, access studies, and ownership are all vital, and should be supported as well. Renewable energy standards, incentives, and partnerships are key to help tribes build out the renewable energy programs. And cross-agency coordination is very important, given that DOE and DOI has started the process in the last few years. And finally, strengthen and improve the consultation and coordination process when it comes to working with tribes throughout the country.

In conclusion, no message resonates better than success. As noted, dedicated resources and funding investments are vital to the success in Indian Country. I thank you for allowing me to share a few of these recommendations. I am happy to answer any questions.

[Prepared statement of Mr. Deschene follows:]

**Testimony of Christopher Clark Deschene**  
**Former Director of the Office of Indian Energy Policy & Programs, U.S. Department of Energy**  
**before the U.S. House of Representatives,**

**Subcommittee on Interior, Energy, and Environment**  
**Committee on Oversight and Government Reform**

**Hearing on Tribal Energy Resources: Reducing Barriers to Opportunity**  
**July 17, 2018**

**A. Introduction**

Good morning, Chairman Gianforte, Ranking Member Plaskett and members of the Committee. My name is Christopher Clark Deschene, I am a member of the Navajo Nation and I am currently a partner with Rosette, LLP, a national tribal law firm. In my former capacity as the Director of Indian Energy Policy and Programs at the Department of Energy, I was fortunate to address the challenges with tribal energy development. I am here to share my thoughts and recommendations for improving tribal energy development within Indian Country.

**How do we change an industry for Indian Country?**

To change an existing industry and create a new tribal energy niche, we must first recognize there's a problem. Generally, this is the necessary first step to recovery. The problem is simply, there is not enough resources to fully support the build out of programs to help tribes become energy independent. Secondly, we need information to act on and therefore, require baselines to understand the problem and potential with tribal energy development in Indian Country.<sup>1</sup> We cannot responsibly fix the problems if we do not know where or how to begin. For example, the Department of Energy has funded baselines studies under the National Energy Technology Laboratory (NETL) and the Office of Energy Efficiency & Renewable Energy (EERE) to determine the potential markets, costs, performance standards, opportunities and risks associated with both fossil and renewable technologies and development. Federal, state, and tribal efforts all need transmission, fossil, renewable and market baseline studies to build data, metrics, policy and effective programs for tribal energy development.<sup>2</sup> Third, our entire government should help support tribal leaders who are currently developing a national strategic energy plan for a tribal energy industry. For example, tribal leaders have formed the National Inter-Tribal Energy Council (NITEC) to address the common interests of its members while building industry partnerships and developing a

<sup>1</sup> According to the Bureau of Indian Affairs, 56.2 million acres of land—approximately 2.3% of the total U.S. landmass—is held in trust for federally recognized Indian tribes. This land contains an estimated 5% of all U.S. renewable energy generation potential. (Doris, Elizabeth, Lopez, Anthony, and Beekley, Daniel. 2013. *Geospatial Analysis of Renewable Energy Technical Potential on Tribal Lands* (Technical Report). NREL-56641. National Renewable Energy Laboratory (NREL), Golden, CO. <http://www.nrel.gov/docs/fy13osti/56641.pdf>). Utility-scale solar alone is 5.1% of the entire solar PV generation potential of the United States (Ong et al. 2013). This level of solar resource, coupled with the vast land resources of Indian tribes, creates a unique opportunity for solar development on a large scale.

The U.S. Energy Information Administration website also states that the United States generated 4,087.4 terawatt-hours of electricity in 2015 largely produced from coal and natural gas. The U.S. Department of Energy's (DOE's) National Renewable Energy Laboratory (NREL) estimates that, on average, it takes 2.8 acres of land to produce 1 gigawatt-hour of electricity through solar PV, (Ong, Sean, Campbell, Clinton, Denholm, Paul, Margolis, Robert, and Heath, Garvin. 2013. *Land-Use Requirements for Solar Power Plants in the United States* (Technical Report). NREL-56290. National Renewable Energy Laboratory (NREL), Golden, CO, available at <http://www.nrel.gov/docs/fy13osti/56290.pdf>). Tribes, working with government agencies and private partners, could potentially offset the entire electricity generation of the United States with solar PV using just 20.4%—approximately 11.4 million acres—of their land.

<sup>2</sup> See NETL Baseline Studies at <https://www.netl.doe.gov/research/energy-analysis/baseline-studies>; see also EERE at <https://www.energy.gov/eere/slc/energy-efficiency-potential-studies-catalog>.

national strategic tribal energy plan. Fourth, stakeholders including this body, need to actively participate and partner with tribal leaders working to solve problems within Indian Country. Continued meetings and hearings do nothing but repeat the problems. What we need is vested leadership, dedicated resources and government and industry partners willing to support the entire strategic plan. Finally, we need some votes on existing legislation to continue the work initiated under the 2005 Energy Policy Act.

Despite the complex, paternalistic and burdensome networks of federal Indian law and regulations, tribes and their partners must also continue to educate everyone and as Navajo's say, "A'achi'ji' Nantii'en", which means "Educate Them All."

## **B. Policy Challenges Imposed by Fragmented Federal Regulatory Process for Energy Development**

There are four general reasons underlying tribal energy issues and undermining federal-tribal energy policy. These are 1) the federal government's antiquated land policies with respect to American Indians and Alaska Natives, 2) the federal courts' use of judicial plenary power, 3) the inability of the legislative branch to pass comprehensive tribal energy legislation and dedicate adequate resources and 4) the paternalistic, inefficient, and archaic bureaucracy of the executive branch and agencies. Together, these hurdles have hurt tribal energy development in Indian Country. Today, we will focus on the latter two reasons.

### **1. United States Congress**

With respect to Congress, the congressional elections over the last twelve years have hurt Indian energy development. Tribal energy bills designed to continue the work started under Title V of the 2005 Energy Policy Act, the 2007 Energy Independence and Security Act (EISA), and the 2009 American Resource and Recovery Act (ARRA), have all stalled due to House and Senate inaction.<sup>3</sup> The first sequence of congressional failure, impairment and delay, occurred with the non-passage of the 2010 Indian Energy Promotion and Parity Act and the Indian Tribal Energy Development and Self Determination Act Amendments (ITEDSDAA) of 2011.<sup>4</sup> These laws were designed to continue the support of tribal energy development initiated in 2005. Congress never gave them an up or down vote. The second and third sequences of congressional failures began with the Indian Tribal Energy Development and Self-Determination Act Amendments of 2015.<sup>5</sup> Although the Senate has passed the legislation by unanimous consent in December of 2015, the House has referred the bill to three subcommittees with no action since the same time period. Currently, the 2017 version of this legislation has once again been passed within the Senate, referred to the same three House Subcommittees and not received a vote.<sup>6</sup> Subsequently, funding resources that would have been extended under the 2010, 2015 and the 2017 versions of the legislation have been eliminated or delayed, therefore hurting the energy services and programs under the Departments of Interior and Energy.<sup>7</sup>

### **2. Executive Branch**

<sup>3</sup> Energy Policy Act of 2005, Pub. L. No. 109-58 (2005) (Title V, Section 503 also named the Indian Tribal Energy Development and Self-Determination Act of 2005); The Energy Independence and Security Act of 2007, Pub. L. No. 110-140 (2007); The American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 (2009).

<sup>4</sup> Indian Energy Promotion and Parity Act of 2010, S.3752, 111<sup>th</sup> Cong. (2010)(introduced by Sen. Dorgan (D, ND)). Since the formation of Inter-Tribal Energy Network (ITEN) Energy Vision, tribes have worked with the 109th, the 110th, the 111th Congresses to past Indian energy provisions under the 2005 EPAct, the 2007 EISA, and the 2009 ARRA respectfully.

<sup>5</sup> S. 209, 114th Cong. (2015); S. 245, 115th Cong. (2017); *See also* 25 U.S.C. §§ 3501-3506 (2000).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* *See also* H.R. 5325, Energy and Water Development and Related Agencies Appropriations Act of 2013, 112<sup>th</sup> Cong. (2012)(introduced by Congress. Frelinghuysen); *see also* H.R. 2354, S.2465, 112<sup>th</sup> Cong. (2012).

The executive branch has also encumbered Indian energy development by inadequately staffing personnel for key energy positions and project reviews.<sup>8</sup> Federal agencies have also minimized the budget needed to provide adequate and meaningful services and financial support to tribal energy development. In some instances, the executive agencies have disregarded the basic principles of government-to-government consultation required for tribal nations.<sup>9</sup> For example, the Navajo Nation argued that the U.S. EPA's 2011 Mercury and Air Toxics Standard (MACT) Rule adversely affected the Navajo Nation's existing natural resource economy and government revenue sources.<sup>10</sup> Under the MACT rule, the Navajo Nation argued that the U.S. EPA failed to consult with the Navajo Nation as required by law.<sup>11</sup> Consequently, some tribal leaders have begun to disregard bureaucratic and trust limitations and federal oversight and pursue independent economic policies to end nonconsensual or exploitive agreements.<sup>12</sup> The problems however, still exist to hinder tribal energy development. As a result, tribal leaders are shifting the tribal energy development paradigm despite the federal government's challenging network of energy laws and regulations.<sup>13</sup>

### C. Changing the Tribal Energy Paradigm

"Energy projects represent the most meaningful and sustainable economic development opportunities to ever arise for some tribes that have been mired in endemic poverty."<sup>14</sup> Tribal leaders throughout Indian Country have expressed over and over that tribal resources including water, land, minerals, and labor can help solve our Country's energy challenges.<sup>15</sup> Tribes have consistently repeated that if our Country seeks energy independence, tribes and their resources must be part of the equation and solutions offered by our Country's energy industry. Accordingly, tribes have offered recommendations to change the old energy industry's model. For example, some recommendations made to Congress, the Administration, and federal agencies, and Industry are as follows:

#### 1. Congress

Both the House and Senate leadership and committees should consider the following:

<sup>8</sup> *Indian Energy and Energy Efficiency: Hearing on Indian Energy and Efficiency Before the Senate Indian Affairs Committee*, 111<sup>th</sup> Cong. (statement of Jim Gray, Chairman Osage Nation; Chair, Indian Country Renewable Energy Consortium).

<sup>9</sup> See Troy A. Eid, *Beyond the Dakota Access Pipeline: Working Effectively with Indian Tribes on Energy Projects*, ABA (last visited July 13, 2018), [https://www.americanbar.org/groups/environment\\_energy\\_resources/publications/trends/2017-2018/march-april-2018/beyond-the-dakota-access-pipeline.html](https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2017-2018/march-april-2018/beyond-the-dakota-access-pipeline.html) (explaining that the Executive branch has expanded consultation policies to give tribes more say in decision-making and established detailed consultation requirements at the agency level); See also *The American Energy Initiative: What EPA's Utility MACT Rule Will Cost U.S. Consumers: Hearing on U.S. EPA's MACT Rule Before the House Comm. On Energy and Commerce*, 112<sup>th</sup> Cong. (statement of Harrison Tsosie, Attorney General, Navajo Nation). See also National Energy Policy, May 2001, National Energy Policy Development Group (NEPD), under his National Energy Policy of 2001, President Bush initially sought to respond to America's growing energy consumption. President Bush presented his solution to America's energy problems in May 2001 with the National Energy Policy (NEP). The problem in Indian Country, was that the NEP did not consult with tribes.

<sup>10</sup> *Id.* at 3 (the MACT ruling directly impacts coal-fired power plants sited on the Navajo Nation).

<sup>11</sup> *Id.* at 4. See also E.O. 13175, 65 Fed. Reg. at 67249 (stating that "the United States has a unique legal relationship with Indian tribal governments... [every federal agency] shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.").

<sup>12</sup> See generally Robert N. Clinton, *There Is No Federal Supremacy Clause For Indian Tribes*, 34 Ariz. St. L.J. 113, 179-180 (2002) (discussing tribal termination and surplus land policies).

<sup>13</sup> Interview with Roger Fragua, Deputy Executive Director, Council of Energy Resource Tribes, in Washington, D.C., (Oct. 15, 2003).

<sup>14</sup> *Indian Energy Promotion and Parity Act of 2010: Hearing on 2010 Indian Energy Promotion and Parity Act Before the Senate Comm. On Indian Affairs*, 112<sup>th</sup> Cong. (statement of Joe Garcia, President, National Congress of American Indians).

<sup>15</sup> *Id.* See also *Energy Development in Indian Country: Hearing on Energy Development in Indian Country Before the Senate Comm. On Indian Affairs*, 112<sup>th</sup> Cong. (February 16, 2012).



- a. Continue tracking the implementation of the 2015, 2016 and 2017 GAO Report Recommendations related to tribal energy development.<sup>16</sup>
- b. Pass national tribal energy legislation that updates, amends, and supports tribal leadership recommendations to date, including but not limited to amending the 2005 Energy Policy Act<sup>17</sup>
- c. Amend Hearth Act to allow tribes to approve leases and easements for tribal energy development.<sup>18</sup>
- d. Reauthorize and fund the Office of Indian Energy at DOE at \$100M with 25 Full Time Employees
- e. Create a Senate confirmed Assistant Sec. of Indian Energy position
- f. Address Tax Issues including Dual Taxation and Incentives<sup>19</sup>
- g. Authorize and allocate funds for the Tribal Energy Loan Guarantee Program at a minimum of \$100M<sup>20</sup>
- h. Support Tribal-Industry Partnerships by supporting DOE's Office of Indian Energy's Strategic Roadmap 2025 strategic goals including the build out formal tribal business roundtables.<sup>21</sup>

## 2. The Administration

With respect to the Administration, the White House and its senior advisors should:

- a. Review, track, and implement the aforementioned 2015, 2016 and 2017 GAO Report Recommendations related to tribal energy development.
- b. Appoint senior staff to coordinate tribal energy activities across the Administration as developed under the White House Council on Native American Affairs.
- c. Implement a five to ten-year budget plan for tribal energy programs at the Departments of Energy and Interior through the Office of Management and Budget.

### Federal Agency: Department of Energy

- a. Fund the Office of Indian Energy Policy and Program (OIEPP) at \$100M annually
- b. Staff the OIEPP at 25 Full Time Employees

<sup>16</sup> See GAO Rep. to Senate Comm. Indian Affs., *Poor Management by BIA has Hindered Energy Development on Indian Lands*, GAO-15-502 (2015); see also GAO Report, *Indian Energy Development: Additional Actions by Federal Agencies to Overcome Factors Hindering Development*, GAO-17-43 (2016); see *Progress on Many High Risk Areas, While Substantial Efforts Needed on Others*, GAO-17-317 (2017); see also *Testimony* from Frank Rusco, Director, Nat. Resources and Environment (Feb. 15, 2017) (outlining federal management challenges related to Indian energy resources); see also *Testimony* from Michael Black, Acting Assistant Sec., Bureau of Indian Affs., to the Senate Comm. on Indian Affairs (May 17, 2017) (explaining that the development of energy resources offers tribes many opportunities to bolster their economies, and previous GAO reports recommend supporting tribal energy development).

<sup>17</sup> S. 209, 114th Cong. (2015); S. 245, 115th Cong. (2017).

<sup>18</sup> Helping Expedite and Advance Responsible Tribal Home Ownership (HEARTH) Act of 2012, Pub. L. No. 112-151 (2012) (codified at 25 U.S.C. §415); see also *Indian Country Today*, *Why Tribes Need the HEARTH Act and BIA Leasing Regulations* (Oct. 18, 2013), <https://newsmaven.io/indiancountrytoday/archive/> (arguing that the HEARTH Act permits tribes a greater measure of control over the leasing of tribal lands, allows for specially tailored leasing programs, and enables tribes to implement leases at their own pace).

<sup>19</sup> See *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989) (permitting dual taxation in which both the state and tribe may impose a tax); see also Kelly S. Croman & Jonathan B. Taylor, *Why Beggar Thy Indian Neighbor? The Case for Tribal Primacy in Taxation in Indian Country*, JOPNA 2016-1 (May 4, 2016); Valerie Volcovici, *Native American Tribes Decry State Taxation of Reservation Energy Projects*, REUTERS (Jan. 27, 2017) (quoting Mark Fox, Chairman of the Mandan, Hidatsa, and Arikara Nation) ("Dual taxation is an impediment to development[.]").

<sup>20</sup> See S. Amdt. 3833 (114th) (Alan Franken) to H.R. 2028 (114th). While Sen. Franken's amendment provided for \$10M, Congress should allocate \$100M for the Tribal Energy Loan Guarantee Program.

<sup>21</sup> Strategic Roadmap 2025: Office of Indian Energy Policy and Programs, available at <https://www.energy.gov/sites/prod/files/2016/03/130-DOI%20Office%20of%20Indian%20Energy%20Strategic%20Roadmap%202025.pdf>.

- c. Support Senate confirmed Assistant Sec. of Indian Energy position for OIEPP
- d. Support changes to 50% matching and allow for 0-10% matching requirement
- e. Assign a career Deputy Director to OIEPP
- f. Fund and establish the Tribal Energy Loan Guarantee Program
- g. Follow Strategic Roadmap 2025 Recommendations as originally approved<sup>22</sup>
- h. Fund national laboratory baseline studies for tribal energy development and policy needs
- i. Hire federal Indian law experts to serve within the Office of the General Counsel, Congressional & Intergovernmental Affairs; and Western Area Power Authority

**Federal Agency: Department of Interior**

- a. Continue to implement 2015 and 2017 GAO Recommendations<sup>23</sup>
- b. Fund DOI's Office of Indian Energy & Economic Development (IEED) and the Department of Energy & Mineral Development (DEMD) to maximize programs supporting tribal energy development

**3. Industry**

Since the inception of DOE's Tribal Energy Program in 2002, Indian Tribes and Alaska Natives have consistently identified the lack of, and the need for focused, facilitated industry/tribal partnerships to develop new and innovative approaches for tribes to access capital for construction of clean energy systems on Indian Lands.<sup>24</sup> The DOE's Office of Indian Energy Policy and Program's Indian Country Energy and Infrastructure Working Group (ICEIWG) has recently identified access to private capital as the single largest barrier to clean energy development, and the single highest priority for Indian tribes and Alaska Natives seeking to deploy community and commercial scale clean energy projects on Indian Lands.<sup>25</sup> Accordingly, Industry with Congress could:

- a. Support the National Inter-Tribal Energy Council (NITEC)<sup>26</sup>
- b. Support Legislation that Address Procurement Opportunities<sup>27</sup>
- c. Support Financial Industry Development Opportunities

**4. Policy**

- a. Support and fund agency programs related to energy: Housing, EPA, Transportation, USDA, etc.
- b. Support Programs that build Tribal Capacity: Education, Workforce Development, etc.
- c. Support Transmission Planning, Access, Studies, and Ownership<sup>28</sup>
- d. Support Renewable Energy Standards, Incentives, and Partnerships
- e. Support and Encourage Cross-Agency Coordination

<sup>22</sup> *Id.*

<sup>23</sup> *Hearing High Risk, No Reward: GAO's High Risk List for Indian Programs Before Senate Comm. On Indian Affairs* (Testimony of Michael Black, Acting Ass't Sec., Bureau of Indian Affairs, U.S. Depart. of Interior) (May 17, 2017). See also *Energy Development in Indian Country: Hearing on Energy Development in Indian Country Before the Senate Comm. On Indian Affairs, 112<sup>th</sup> Cong.* (Jodi Gillette's Testimony, February 16, 2012).

<sup>24</sup> Pierce, Lizana, Personal Interview, Golden, CO. (2016).

<sup>25</sup> Doris, Elizabeth, MacCourt, Douglas, Policy Priorities Report, Quarterly Meeting of the Indian Country Energy and Infrastructure Working Group (ICEIWG), Portland, OR. (June 2016).

<sup>26</sup> National tribal energy trade association established May 3, 2018 with the purpose to promote the common interests of its members and improve their business and economic conditions for the benefit of American Indian and Alaska Natives.

<sup>27</sup> *Energy Development in Indian Country: Hearing on Energy Development in Indian Country Before the Senate Comm. On Indian Affairs, 112<sup>th</sup> Cong.* (February 16, 2012).

<sup>28</sup> James Steele, Vice President, Affiliated Tribes of Northwest Indians, Address at the Department of Energy Tribal Summit (May 4, 2011).

## f. Continue and Strengthen Consultation and Coordination Processes

**D. Conclusion**

No message resonates better than success. To be successful, Congress and the Administration together with Indian Country, must support the changes necessary for tribal energy industry shifts. As noted, dedicated resources and funding investments are vital in addition to halting policies to decrease tribal energy programs. What's missing are partners including the federal government and industry with resources and funding to sustain energy development in Indian Country.

As David Lester stated many times, "Tribes want to develop the resources with which nature endowed their lands for the economic and social benefit of their own communities and families and according to their own values... tribes want to make their valuable energy resources, both conventional and renewable, available to help all Americans remain prosperous and energy-secure. Tribes are now taking their rightful place in the American system of government and are more able to fulfill their governmental responsibilities... Equally important, Indian tribes are participating and competing in the American economic marketplace."<sup>29</sup>

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<sup>29</sup> Statement of David Lester, former CEO of the Council of Energy Resources Tribes (CERT), *available at* <https://www.indianz.com/News/2009/013334.asp>.

Mr. GIANFORTE. Thank you for the panel for your insightful testimony.

We will now move to questions. And I'd like to recognize Mr. Palmer for five minutes.

Mr. PALMER. Thank you, Mr. Chairman. Mr. Henson, what does the Indian community stand to gain as far as employment growth if the regulations are reduced or simplified?

Mr. HENSON. That's an interesting question, and I have not quantified it personally. I would certainly be interested in looking into that and getting back to you, if that's a possibility.

Mr. PALMER. Well, listening to the testimony of Chairman Not Afraid and Councilman Red, it's obvious that it would be an economic benefit to the tribes not only in revenue, but in jobs. And I see Chairman Not Afraid nodding. Do you want to comment on that?

Mr. NOT AFRAID. Yes. Thank you, Mr. Palmer. First of all, I've observed and analyzed that for every 2 million tons of coal being developed creates a minimum of 120 well-paid jobs for the Crow people.

Mr. PALMER. Say that again. How many well-paid jobs?

Mr. NOT AFRAID. A hundred-and-twenty.

Mr. PALMER. Mm-hmm.

Mr. NOT AFRAID. And the average annual salary is about \$80K.

Mr. PALMER. \$80,000? That's a very high-paying salary in Montana, I believe, Mr. Chairman. Let me ask you this, and this is for Chairman Not Afraid and Councilman Red. What other energy resources are available on tribal lands? Because I think you said that 88 percent of the tribal lands contain some kind of energy resource. And you mentioned coal. Are there other resources?

Mr. RED. Thank you. I'll take a stab at that. With us, with the Southern Utes, we have natural gas, and we are one of the largest producers of natural gas in the country. And so that's where a lot of our resources are from. We've got our own companies that, on the reservation and off reservation, that deal with that. We also have coal. We haven't developed the coal. We've developed the methane underneath it, or out of the coal itself. And there's numerous other, as well as, like solar power. We've got 300 days of sunlight. Wind potential. There's a lot of other energy resources that we could take advantage of there, but we really haven't gotten into yet.

Mr. PALMER. Do you have the infrastructure to—if you are developing solar and wind power, do you have the infrastructure in place where you can sell that power off reservation, off the tribal lands?

Mr. RED. We don't. And that's part of the problem in the location. We're really isolated when it comes to infrastructure on a national level. So we're really isolated when it comes to that.

Mr. PALMER. Do you know if any of the Green River formation are on tribal lands? That'd be northern Colorado—western Colorado, northern Utah, southwestern Wyoming. Do you know if any—I know it wouldn't be your tribal lands, but do you know if any of that is on tribal land?

Mr. RED. Not on ours.

Mr. PALMER. That's one of the largest reserves of oil, recoverable oil, shale, in the world. It holds three times more recoverable oil than the world's used in the last 100 years. And it is five to six times the known reserves of the Saudi's.

Let me ask you this. If given the opportunity to properly develop these energy resources, one of the issues, and it goes back to the jobs issue, it's not just a mining job, but the opportunity for members of your tribes, younger member of your tribes, to take science and math, and become energy engineers, experts in the energy field, which I think that needs to be explored and developed.

Mr. NOT AFRAID. Right. In Crow country it is a domino effect. So when development occurs, uh, it also enhances the social well-being to the Crow membership, a sense of living, a sense of pride, as well as a healthy community. And as to Crow, speaking about Crow, the diversification of all the energy, we have three major grids coming from the south, east and west. So if we were to develop the wind-mill, develop the hydro-plant that we have under way, and other green energy developments that are under way, we can have a robust system that we would not depend on the Federal Government for anything.

Mr. PALMER. Well, I see your ability to develop the resources that you own as a way to not only increase the revenue potential for the tribes, but also to elevate the tribe, in terms of professional opportunities, engineers, business people. It could be a tremendous help to the tribe across the board. Not just in the laborers who go out and extract the minerals, but those who develop programs for the use of them, including engineering the infrastructure, so that you can move it where it needs to go.

My time's expired, Mr. Chairman. I yield back.

Mr. GIANFORTE. Okay. Thank you. At this time I recognize the ranking member for her questions.

Ms. PLASKETT. Thank you, Mr. Chairman. Mr. Deschene, I want to thank you for coming here to testify. You have a large body of work and experience in this area that I'm glad that you are trying to share with us. Mr. Henson, you were correct that I do believe that, and you may have heard in other hearings me talk about unnecessary duplication. I'm really trying to streamline public policy. It's enormously important. It really impedes development in the areas that are least likely to receive it, because of bureaucracy. And so in your testimony, based on your experience, you advocate significant increases in federal spending. Specifically, you advocate funding the Office of Indian Energy to \$100 million, with 25 full-time employees. You also talk about allocating a minimum of \$100 million to the Tribal Energy Loan Guarantee Program.

What level of funding has been authorized in these last Congresses roughly for the office and the loan program while you were serving as director?

Mr. DESCHENE. Thank you. When I came to—thank you for that question. Chairman and member of the committee, when I arrived at DOE in 2015, we had a budget authorization from Title V of \$20 million for 10 years, starting in 2005. The Office never received the full amount of the \$20 million, at least while I was there. When I arrived it was given, in 2015, a \$16 million allocation.

Ms. PLASKETT. So your funding was decreased.

Mr. DESCHENE. Right.

Ms. PLASKETT. And how many employees, or how many people were staffed at that time?

Mr. DESCHENE. So at that time, two, officially. Myself and headquarters' element support staff. And then from there we began consolidating the program and presented table organization through HR at DOE in an effort to consolidate —

Ms. PLASKETT. What area of land were you three people supposed to be supporting at the Department of Energy for Indian energy?

Mr. DESCHENE. So we were charged with the entire United States, including Alaska, with, at that time, 567 tribes.

Ms. PLASKETT. So 567 tribes, for all of their energy needs, the Department of Energy gave you three, yourself and two other employees. Or was it four, you said?

Mr. DESCHENE. Well, that's currently what you see on the website today, but by 2017 we had grown, through consolidating efforts, to about a complement of six to seven.

Ms. PLASKETT. Okay. Six or seven employees, with \$20 million, then reduced to \$16 million. What would giving a \$100 million and 25 employees allow you to do?

Mr. DESCHENE. So with regards to the employees we have three offices. Headquarters in D.C., the Golden field office, which handles a lot of the deployment efforts, and then Alaska, in Anchorage. So the weight of the program is the deployment effort, which is financial.

Ms. PLASKETT. So you'd like to get people out there in the field

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Mr. DESCHENE. Right.

Ms. PLASKETT.—is what you're saying.

Mr. DESCHENE. Right.

Ms. PLASKETT. And that \$100 million would support those salaries as well as the ability for them to go out into the field.

Mr. DESCHENE. So salaries and the administrative would be, and I can't remember the numbers, but it would be on the order of —

Ms. PLASKETT. So how would that help Chairman Not Afraid as well as Councilman Red if you were to be able to have that?

Mr. DESCHENE. For example, if we had a program that supports energy investment, what we call still-in-the-ground projects—the problem with investing in projects is they're either very small, which DOE currently supports \$50,000 to \$250,000 feasibility-type projects, or they're very large, in the hundreds of millions. There is not support for programs or development in the range from \$5 to \$50 million on investments for community scale energy projects in Indian Country.

Ms. PLASKETT. You know, I talked and others have talked about streamlining processes. You are not against streamlining some of these permitting processes.

Mr. DESCHENE. No. It's needed. It's definitely needed. It's absurd that tribes have to go through additional barriers to get the same type of approvals for energy projects.

Ms. PLASKETT. But increasing the funding, and particularly the loan funding, would allow you to deploy more support to the tribes to be able to —

Mr. DESCHENE. Right.

Ms. PLASKETT. Be able to do the things that the Chairman was talking about.

Mr. DESCHENE. Right. So larger projects under an Indian loan guarantee program would support more investment.

The problem with that, there's two. One, there is a \$50,000 requirement under DOE for tribes to put up to begin the application. That's a barrier in itself. Secondly, the current program allows for innovative design and application. That's a barrier in Indian Country, because we're not looking to prove up technology. We are just looking to apply in remote distant locations the same technologies that the rest of America enjoys.

Ms. PLASKETT. Thank you. Thank you so much for the time, Mr. Chairman.

Mr. GIANFORTE. Yeah. Thank you. And at this time the Chair recognizes Mr. Comer for his questions.

Mr. COMER. Thank you, Mr. Chairman. My first question is to Mr. Henson. In your written testimony you discuss the untapped resources of tribal lands. Eighty-eight percent of Indian surface lands have resources, but have yet to be developed. Is the complexity of the federal permitting process impacting tribes' ability to use their own land, and if so, how?

Mr. HENSON. It certainly is. I mean the slide we saw from Councilman Red illustrates that. Every marginal decision for outside investment looks at how much time and how much capital will have to be invested here. And if a tribal development is less appealing than a next-door development, you know, over time that sends a signal to outside investors to invest not on tribal lands. And, you know, sort of reflecting on the last question, also, I think about 2 million acres of surface lands are currently developed, tribal lands, and the measure is something like 15 million undeveloped. There's quite a lot of availability for when solar, geothermal, hydroelectric, there's massive capacity for renewable development on tribal lands. And so streamlining those processes can be just tremendous.

Mr. COMER. I firmly believe the Federal Government excessive regulatory environment has held us back as a nation from utilizing the resources that we have, especially with the tribes. My question, Chairman Red and Councilman Not Afraid, how many jobs have been created for members of your tribe as a direct result of energy development projects?

Mr. NOT AFRAID. Over a period of 40 years, sustainable jobs through development with our partner, Absaloka, Westmoreland Mine, we fluctuate anywhere from top of 300 to a bottom of 120. And with other venues and diversification within coal, that's also creating new jobs, with new technologies.

Mr. COMER. Right.

Mr. RED. On the Southern Ute we do have—I can't give you a direct number, or absolute number, but we do have quite a few jobs that are influenced. We have members that work for our own oil and gas companies, and we also have members that work for other companies within the reservation. We also work with San Juan School of Energy, or it's San Juan Community College School of Energy, where we send our employees, our tribal members, and other staff down there to get the training necessary to be fruitful

in this formation, or in the development of our area. So we don't really put a number on the jobs there, but it, for the region itself, is huge with the number of jobs it's provided.

Mr. COMER. Can you gentlemen tell us, tell the committee, some benefits your tribe has been able to provide members with the revenue produced by developing your energy resources?

Mr. NOT AFRAID. Sure. Thank you for that question. That's an ideal question, only because the revenues that derive off of that coal development ensure that our elder programs continue scholarships. Even in the realm of health, and we talk about the Affordable Care Act —

Mr. COMER. Mm-hmm.

Mr. NOT AFRAID.—at times we know that that lacks a lot of issues in itself. So the tribe on the royalty side picks up on that end. So to me I'm not complaining, but the point is, is if we could develop more then we can just entirely take care of ourself.

Mr. RED. And for us, we give a distribution to our members every month, or throughout the year. We also have healthcare for all our members. Nothing's denied. We pay for everything. We also have education. So everybody's guaranteed a secondary education if they decide to pursue that. And that's really unheard of when it comes to Indian Country, is providing all these resources on something that we've got from our natural resources.

Mr. COMER. Right. Well, thank you very much. Mr. Chairman, I yield back.

Mr. GIANFORTE. Okay. Thank you. And I'll recognize myself for questioning at this time.

Councilman Red, I'd like to follow-on Mr. Comer's question. Just listening to your testimony and reading the written testimony, it's clear that you've, in the face of some large obstacles, you've still been able to develop these energy resources. Could you talk on a more personal level what it means to an individual family in the Ute Nation when they receive benefits from energy development?

Mr. RED. Well, as an individual on the Southern Ute Indian Reservation, I mean it is huge. It's really hard to put into words. At one point, as in my testimony, we had to stop distribution payments. So we couldn't even afford to pay our members. And for much of my lifetime that's —

Mr. GIANFORTE. What would that mean to a family when they don't get a distribution payment?

Mr. RED. There's not a lot of employment on the reservation. So no income means it's Second-, Third-World conditions. But because we do have this, and it's made our reservation and families prosperous, and they're able to live a good life. We do run into some problems with the amount of money now coming in, but I would rather have that problem than nothing at all. And it gives a chance for our members to succeed. Whether they want to work locally, there's an opportunity. And whether they want to go on to school, they have that opportunity, also.

Mr. GIANFORTE. So you've used a couple words there. Energy development has brought prosperity and success to your people, and clearly that's a good thing.

Mr. RED. Yeah.



Mr. GIANFORTE. Chairman Not Afraid, welcome again to a fellow Montanan. You know, we've spent time together in Crow Country, and for whatever reason we've had limited energy development. And it's clearly your decision as a sovereign nation what you want to do with your energy resources. Could you describe the situation you have in Crow Country today, and what additional energy development would mean to the families there?

Mr. NOT AFRAID. Yes. Thank you. Well, first of all, there was a study done during the Bush Administration that depict approximately \$1 trillion worth of asset development prospects. But the Crow Tribe, at the time, couldn't fully implement, only because the government runs on a two-year cycle at that time. Now with this new constitution that we adopted allows for a four-year term, because when we do talk about permitting, whether it's a mine, whether it's oil, whether it's a gravel pit, the redundancy of the process takes more time.

Therefore, as an elected official you may not see the fruits of your labor because of the time it takes to develop. Overall, what we have developed is, like Southern Ute, where the royalties truly benefit the people. And the government itself does not partake in that. That's a dividend paid out to the people for their share of ownership in the mineral.

But if we can continue to develop soundly, again, that's our way out of the hole. And until we recognize or streamline some of these processes, we're at a major disadvantage. Like what was stated earlier by Mr. Henson, a parcel right next door appealing has less restrictions through the State of Montana. Not only that, less fees. So when a developer comes in and sees prime, they tend to be deterred because of fees and time.

Mr. GIANFORTE. Mm-hmm. If you could explore that a little more. The differences between energy development on private land off the reservation versus development of the tribe's resources on the reservation. From a permitting perspective, why does it take so much longer?

Mr. NOT AFRAID. Well, first of all, we have this misunderstanding from the federal side. The misunderstanding is private Indian land is treated as federal public land. So individual landowners are subject to the public land laws. And if that was to be differentiated on the purpose of someone owning their own property, why hold them folks down? Because you're deterring them from being prosperous. You're deterring them from utilizing their own mineral. Because I'm not only talking about tribal land. I'm talking about individual tribal members who own mineral assets as well. So them, themselves, they can't come up with a \$9,600 permitting fee when they need to drill ten wells. That's \$96,000 they have to come up front. Where if it was regulated by the State of Montana, it's like \$125.

Mr. GIANFORTE. Yeah. Okay. My time has expired, but I think we're—this is a very helpful discussion. I think we'll do another round of questions, if that's all right. At this time I'll recognize the ranking member.

Ms. PLASKETT. Okay. Chairman Not Afraid, I was hoping that you could give me, if you have proposals that you all have made, as to how the regulations should change to allow you. Have you

presented those, or is there legislation now that's been proposed by someone from the House or the Senate that would be supportive of what you're talking about?

Mr. NOT AFRAID. Yes. Currently, there is legislation on the books which was—it amended the SMCRA law in 2007 that allowed the tribes to administer and regulate their own permitting. But that course of action is also cumbersome, because now the conflicts of tribal rules, tribal laws are reviewed by the solicitor's office. And if there is any conflict in CFR then we have to try to mitigate those issues.

Ms. PLASKETT. And who has the responsibility to mitigate those?

Mr. NOT AFRAID. Interior.

Ms. PLASKETT. Okay. And so you may not be getting the movement to be able to get that done as quickly as possible.

Mr. NOT AFRAID. Yes. There's a gentleman in the crowd here who was a major proponent of it within our legislative branch, name, C.J. Stewart, who was an advocate and a proponent of the tribe taking this into their own destiny, because when Congress had passed it, it enabled us to, you know, have a vision in taking over this regulatory rule —

Ms. PLASKETT. Mm-hmm.

Mr. NOT AFRAID.—as well as permitting. Because who better to take care of their own land, tribes? I have recently done a video with OSM depicting the reclamation on some of our mining grounds that you would never suspect that mining even occurred there. There's vegetation. Elk come back on it. Antelope, wildlife, in general. The aquifers are stabilizing. It's a really neat process. So we always invite people out to show that the Crow have demonstrated good husbandry to its own land.

Ms. PLASKETT. I hear you. So what you would do is do the regulations and the regulatory requirements, make the decisions, and then possibly report up to Department of Interior, or others, on what the decisions were. And they have to respond in a timely fashion?

Mr. NOT AFRAID. Right. Just another example in this permitting process. For example, in the NEPA requirement, when it requires a cultural survey. What's happening there is you're having a Native American go do a survey, and then a non-native approve that cultural survey. So that's telling me the non-native knows what a cultural survey is, when really, they don't even know what a burial site is, or any other cultural significance. So as that sits on that table for years for them to identify what we're telling them what it is, that's part of the cumbersome reality I'm talking about.

Ms. PLASKETT. So with the proposal—so I'm thinking of ways in which this can be married. So with the proposal that Mr. Deschene has, with increasing the number of individuals, those who are culturally sensitive, who are possibly Native American, and be able to be out in the field in greater number, be something along with having the rights of the tribe to make those decisions, be one that you think is something that would work well.

Mr. NOT AFRAID. Yes. And I truly believe because of treaty purposes it's—even though we call it nation to nation —

Ms. PLASKETT. Uh-huh.

Mr. NOT AFRAID.—it's big brother, little brother. That's how I view it. And if —

Ms. PLASKETT. Listen, someone living in unincorporated territory understands that completely, [Laughter.] what that feels like.

Mr. NOT AFRAID. Yes. Yes. And the good thing is, that I see, is that as we shed more light on these issues, there are people willing to take the time to say, "Okay. What can we do about this?" So we've provided solutions. We've also demonstrated whether we had to recruit technical staff just to ensure that practices are being done professionally.

Ms. PLASKETT. So can I ask also, when you talk about some of these permitting, I know in the Virgin Islands we face permitting that's not just related to the Army Corps, to National Marine Fisheries, to multiple agencies that have to do a permitting process. Are you facing those same issues as well?

Mr. NOT AFRAID. Yes, we are, because Interior, again, has to pawn off to the other sister departments for those oversights. So even though Interior gets bashed a lot, really, that's the wrong people to really bash on, because they have recently, in turn of events, they've been proponents of tribes. Yet, the processes still remain the same, where those other sister agencies, such as BLM, have to tell us, yeah, that is a cultural site.

Ms. PLASKETT. Okay. Thank you. Thank you very much, Mr. Chairman.

Mr. GIANFORTE. Okay. So I'll recognize myself for a final round of questioning.

I really want to focus on what do we do next. I'm a big—played football in high school. We won games by running three- to five-yard plays, and you've brought very constructive suggestions today. Chairman Not Afraid, you've talked about the obstacles you face when tribal land is treated as public land, raising the regulatory burden. There was some testimony about clarifying the TERA rules. These are very specific things that we can investigate. So for all of the members on the panel, I want to ask you, you've brought good suggestions. What are the top three things you think we ought to do? And, again, in terms of making it easier for tribes to determine the best way to develop their resources on your reservations. So who would like to start? What are the three things we ought to do? Chairman?

Mr. NOT AFRAID. Thank you, Chairman. One of the first things that I see that Crow Tribe would believe would be paramount is allowing the tribes to, again, administer and regulate on its own. The purpose of that would to—would not only expedite development, but it would ensure that we have sound practices beginning within our reservation, because we've seen in the past where some—other developments, whether it's a gravel pit, or what have you, the Feds had not done their trust responsibility; therefore, there were abandoned mines. But if the tribe was in the driver seat, we would've made sure that those were reclaimed. We would've made sure that all the archeological surveys were done or completed prior to disturbances of burial sites, or cultural sites.

Mr. GIANFORTE. Okay. Mr. Henson.

Mr. HENSON. I think the overarching thing is what I'd call the two-prong approach. It's continued reliance on tribal decision-mak-

ing, but also funding the liaison roles to the kind of levels we've been hearing about today. Because the Federal Government can bring some real technical expertise to assist, as opposed to sort of serving as a roadblock. There are a number of legislative ideas out there. Let's, you know, let this tribe—let's let Navajo have the right to lease its surface lands without as much approval. But that's very conservative. It's one tribe, one strata of the possible energy development rights. And so a lot of the moves forward are just kind of baby steps. And so I would argue that the current situation has developed through a whole lot of, I guess the technical term would be CUIA kind of maneuvers. We'll layer Fish and Wildlife over Interior, over Energy, and you end up with multiple sort of overlapping jurisdiction.

Mr. GIANFORTE. So the suggestion, Mr. Henson, that is just to streamline the number of agencies that are involved.

Mr. HENSON. A little bit. Yes.

Mr. GIANFORTE. Okay.

Mr. HENSON. If we can find like this sort of one-stop shop and actually make it work without being an additional layer, and when a tribe has to go out and interface with the Federal Government.

Mr. GIANFORTE. Okay.

Mr. HENSON. And then I'm personally an advocate for things akin to the contracting and compacting that we've seen in a number of tribal areas. I think the Federal Government should find some resources for block grants to tribes. I mean block grants to the Southern Ute, to hire geologists, if they need one. Or, you know, some more of sort of third-party contracting, where tribes

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Mr. GIANFORTE. Okay.

Mr. HENSON.—can tap into technical expertise outside of the BIA, outside of tribal employees, but just kind of out there in the marketplace.

Mr. GIANFORTE. Okay. Thank you, Mr. Henson. Councilman Red?

Mr. RED. Thank you. I think number one for us is S.245. That is the closest to being complete. And I think that goes to what we want to see. Also, when it comes to us, when it comes to expertise, we have the expertise in place. We've been doing this for many years. So when it comes to the permitting process, from beginning to end, we do that ourselves. It's all in-house. We have our NEPA specialists. We have our cultural resources. We have our natural resources. We have our energy department. We take care of all that in-house. The only thing we wait on is the signature from the Department of Interior. And that's where we're reaching the delays. I mean one signature shouldn't take three years to get. And also with that —

Mr. GIANFORTE. In your opinion, does S.245 fix that problem?

Mr. RED. It helps. It helps. Yeah. I mean there's not one overall solution out there currently, but it would really definitely get us moving in the right direction.

Mr. GIANFORTE. Okay. Thank you.

Mr. RED. And also streamlining the NEPA process, and making some clarifications there. Because treating tribal lands as public lands does not work for Indian tribes. And also the one NEPA process I think would go a long way instead of each department, or

each—I guess, I guess it would be department—having their own NEPA process. So there'd be one defined NEPA process.

Mr. GIANFORTE. Okay. Thank you. And Mr. Deschene.

Mr. DESCHENE. Thank you, Chairman, and member of the committee. At DOE, we had a working group. It's called an Indian Country Energy Infrastructure Working Group. Tribal leaders from all over the country, including Alaska. They determined and decided that the number one policy priority is finding capital or access to resources that help spur energy development. Notwithstanding, what all the leaders here on the panel mentioned, those are all good recommendations. But if we want to jumpstart energy development, we can deal with the bureaucracy and the laws. We can work on that. A lot of good attorneys in the room that can help with that. But we need the capital, and we need business partners. So my recommendation would be we need—it's time for an energy legislation to be approved by Congress. So S.245, or whatever the vehicle is, the process is there for the types of input on it.

Secondly, in keeping with the investment, DOE, DOI needs to have an energy loan guarantee program like we have in other agencies, but for energy, and not conditioned on the application fee. And it needs to be allowed to be deployed, existing technologies, and deployed in remote and distant areas of the country.

And then finally, I would say that, uh, Congress has the power working with the White House and OMB to fund these offices an amount that makes a difference. You need more staff. You need more energy resources to provide for grants, capacity building, education. And so I would say those are the first fix, and then you can build from there.

Mr. GIANFORTE. Okay. I'm going to indulge myself and ask one last question.

For Chairman Not Afraid and Councilman Red, has the creation of the Indian Energy Service Center produced any improvements from a regulatory process?

Mr. RED. For Southern Ute, no. And it's still—we haven't utilized that. I guess it kind of falls in the category of TERA. It's out there, but we haven't taken advantage of it.

Mr. GIANFORTE. OK. Thank you. Chairman Not Afraid.

Mr. NOT AFRAID. I see some advantages of it, but our priorities had been coal, where we identified the SMCRA, where it streamlines some things for the tribes to operate, but we always ended up at that same barrier of waiting on sister agencies on approving things. But back to the—back to the question. We haven't tried that.

Mr. GIANFORTE. Okay. And are you gentlemen familiar with the service center, and the concept of trying to bring the agencies together? Would bringing more agencies into the service center—do you think BIA is equipped to play the role of a lead agency for tribal permitting?

Mr. NOT AFRAID. To be frank, I believe the tribe can handle its own permitting, and for other tribes, I believe that would be a great start. As far as the Crow Tribe, just like with our brothers to the south there, the Ute, already established their permitting processes. And if we engage in that, then what was the sense in us developing our own systems.

Mr. GIANFORTE. Yeah. Councilman Red.

Mr. RED. Thank you. I think for Southern Ute, I mean it's a no for the shop. I think that we are equipped to deal with our own resources, and I think the more agencies that get involved, the more muddy the waters get. And you don't have one clear direction. Maybe if you had one clear direction and definitions in there, it may work, but until that time I think we're best equipped to take over that role.

Mr. GIANFORTE. Okay. Well, I want to thank all the witnesses for your testimony today. The hearing record will remain open for two weeks for any member to submit an opening statement or questions for the record.

If there's no further business, without objection, this subcommittee stands adjourned.

[Whereupon, at 11:15 a.m., the subcommittee was adjourned.]

## **APPENDIX**

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MATERIAL SUBMITTED FOR THE HEARING RECORD



**WRITTEN TESTIMONY OF SHAWN REGAN  
RESEARCH FELLOW  
PROPERTY AND ENVIRONMENT RESEARCH CENTER (PERC)<sup>1</sup>**

**BEFORE THE**

**U.S. HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM  
SUBCOMMITTEE ON THE INTERIOR, ENERGY, AND ENVIRONMENT**

Hearing on “Tribal Energy Resources: Reducing Barriers to Opportunity”

July 17, 2018

**1. Introduction**

Native American reservations have been referred to as “islands of poverty in a sea of wealth.”<sup>2</sup> Per capita income for American Indians living on reservations is about half that of other United States citizens. Thirty-nine percent of Indians live in poverty, compared with 9 percent of white Americans, and Indian unemployment rates are almost four times higher than the U.S. average.<sup>3</sup>

These low incomes persist despite the fact that many Indian reservations contain considerable natural resource wealth, including energy resources. Reservations contain almost 30 percent of the nation’s coal reserves west of the Mississippi, 50 percent of potential uranium reserves, and 20 percent of known oil and gas reserves.<sup>4</sup> The Department of the Interior has estimated that 15 million acres of potential energy and mineral resources are undeveloped on Indian lands, while only 2.1 acres are being tapped for their energy resources.<sup>5</sup> According to one study, the Crow Reservation in south-central Montana contains coal and other assets valued at nearly \$27 billion, or approximately \$3.3 million per person, making the tribe one of the largest coal owners in the world.<sup>6</sup> Yet despite such energy wealth, the tribe’s annual rate of return on coal assets is a mere 0.01 percent, and the tribe has reported unemployment rates as high as 78 percent. Similarly, the

<sup>1</sup> PERC is a nonprofit research institute dedicated to improving environmental quality through markets and property rights. PERC pioneered the approach known as free market environmentalism. PERC’s staff and associated scholars conduct original research that applies market principles to resolving environmental problems. Learn more at [www.perc.org](http://www.perc.org).

<sup>2</sup> See Terry L. Anderson, Bryan Leonard, Dominic P. Parker, and Shawn Regan. *Unlocking the Wealth of Indian Nations*, edited by Terry L. Anderson, 2016. Lexington Press. 34.

<sup>3</sup> Grogan, Maura. 2011. *Native American Lands and Natural Resource Development*. Revenue Watch Institute: 6.

<sup>4</sup> *Ibid.*

<sup>5</sup> Middleton, Robert W. 2008. Hearing before the Committee on Indian Affairs, US Senate. *Indian Energy Development*; Statement of Dr. Robert W. Middleton. 110<sup>th</sup> Congress, Second Session, May 1. Available at: <http://www.indian.senate.gov/public/ files/May12008.pdf>.

<sup>6</sup> Cornell, Stephen, and Joseph Kalt. 2000. Where’s the Glue? Institutional and Cultural Foundations of American Indian Economic Development. *Journal of Socio-Economics* 29(5): 443-70.



Fort Berthold reservation in North Dakota sits atop one of the nation's largest oil and gas plays, but the development of resources on the reservation is slower than off the reservation.<sup>7</sup>

Simply put, energy resources on Indian lands are substantial, and the potential wealth that could be derived from such resources presents a significant economic opportunity for tribal communities, if tribes and individual Indians choose to capitalize on it. Yet, in practice, tribes and individual Indians have encountered barriers that often prevent them from developing or fully capitalizing on their energy resources.

The complex history of federal-Indian relations, as well as the resulting federal trusteeship of Indian affairs, has contributed to these difficulties. Today, crossing a reservation boundary often means entering an entirely different set of legal and property institutions. Inside reservations, legal jurisdictions and land tenure can vary widely, resulting in a complicated mosaic of property ownership, consisting of lands held in trust by the U.S. government on behalf of tribes (tribal trust land), lands held in trust by the federal government on behalf of individual Indians (individual or allotted trust land), and fee-simple lands located within reservation boundaries. Navigating this complex system of land ownership makes both energy development and economic growth difficult on many reservations. Moreover, the federal government's trust authority over Indian lands has often prevented tribes from fully capitalizing on their natural resource wealth when they choose to do so.

The consequences are that even tribes with significant energy resources remain locked in a poverty trap. Their resources amount to "dead capital" that is unable to generate benefits for tribal communities or the broader economy. Policy reforms that enable tribes to more easily convert their resources into "live capital" are sorely needed.

Energy development is just one of many strategies tribes may pursue to generate economic development. But its challenges are similar to the development challenges experienced throughout Indian Country. My written testimony will explore why tribes are often unable to control their own resources and provide insights into how tribes can unleash the tremendous wealth of Indian nations.<sup>8</sup>

## **2. Poverty persists on Native American reservations even though many reservations contain valuable natural resources.**

Indian poverty persists despite the fact that many Native American reservations contain considerable energy wealth. The Department of the Interior recently estimated that Indian lands have the potential to produce 5.35 billion barrels of oil, 37.7 trillion cubic feet of natural gas, and 53 billion tons of coal. According to another estimate, Indian energy resources amount to 30

<sup>7</sup> Crane-Murdoch, Sierra. 2012. The Other Bakken Boom: A Tribe Atop the Nation's Biggest Oil Play. *PERC Case Study*. Available at: <http://perc.org/articles/other-bakken-boom>.

<sup>8</sup> For more detailed discussions, see Shawn E. Regan and Terry L. Anderson, "The Energy Wealth of Indian Nations," *LSU Journal of Energy Law and Resources*, 2014, Vol 3, Issue 1, 195-223; and Shawn Regan, "Unlocking the Wealth of Indian Nations: Overcoming Obstacles to Tribal Energy Development," 2014, *PERC Policy Perspective*. Property and Environment Research Center. Available at: <https://www.perc.org/2014/02/18/unlocking-the-wealth-of-indian-nations-overcoming-obstacles-to-tribal-energy-development/>.

percent of the nation's coal reserves west of the Mississippi, 50 percent of potential uranium reserves, and 20 percent of known oil and gas reserves.<sup>9</sup>

These resources can provide substantial economic opportunities for Native Americans if they choose to pursue energy development. In 2009, the Council of Energy Resource Tribes estimated that, at existing prices, the value of energy resources on Indian lands amounted to nearly \$1.5 trillion.<sup>10</sup> Recent technological advancements in hydraulic fracturing have only increased this potential value.

For many tribes, energy development is the primary revenue generator to fund education, infrastructure, and other public services on tribal land. Some also view energy development as a path to promoting tribal self-determination. Revenue from coal development on the Crow reservation in Montana, for instance, enables the tribe to control more of its own affairs apart from the federal government's trusteeship of Indian lands.

### **3. Most tribal lands with energy resources remain undeveloped.**

Indian lands contain tremendous resource wealth, but the vast majority of tribal lands with energy resources remain undeveloped. The Department of the Interior estimates that energy development is taking place on only 2.1 million acres of Indian lands while an additional 15 million acres with energy potential remain untapped. In other words, 88 percent of Indian lands with energy potential have yet to be developed.<sup>11</sup>

The Fort Berthold reservation, for instance, is located at the center of the shale oil boom in North Dakota. Since 2010, hundreds of wells have been drilled on Fort Berthold, generating more than \$40 million per month for the affiliated tribes in 2013. Just outside the reservation, however, roughly twice as many wells have been drilled per square mile. Lease payments to mineral owners are also higher off the reservation compared to tribal lands, leading many tribal members to question why they are not able to take full advantage of the energy boom occurring around them.<sup>12</sup>

### **4. Federal control makes it difficult for tribes to capitalize on their energy wealth.**

Nearly every aspect of Indian energy development is controlled at some level by the federal government. The Secretary of the Interior must review and authorize all leases and agreements. Federal agencies also collect royalty payments on behalf of tribes and individual Indians and then redistribute them as royalty disbursements to Indian mineral owners.

<sup>9</sup> Grogan, Maura. 2011. *Native American Lands and Natural Resource Development*. Revenue Watch Institute.

<sup>10</sup> Prepared statement by Marcus Levings (of Ft. Berthold Tribe) in Hearing before the Committee on Indian Affairs, US Senate, October 22, 2009.

<sup>11</sup> Middleton, Robert W. 2008. Hearing before the Committee on Indian Affairs, US Senate. *Indian Energy Development*: Statement of Dr. Robert W. Middleton, 110<sup>th</sup> Congress, Second Session, May 1. [http://www.indian.senate.gov/public/\\_files/May12008.pdf](http://www.indian.senate.gov/public/_files/May12008.pdf).

<sup>12</sup> Crane-Murdoch, Sierra. 2012. The Other Bakken Boom: A Tribe Atop the Nation's Biggest Oil Play. *PERC Case Study*. Available at <http://perc.org/articles/other-bakken-boom>.

The government's authority over Indian lands traces its roots to the federal trusteeship established in the early nineteenth century. In 1831, Chief Justice John Marshall described tribes as "nations within a nation," unable to negotiate treaties with foreign nations but implying that they retained the power to govern themselves. Marshall, however, went on to describe the relationship between tribes and the United States as "that of a ward to his guardian." From this conception, the federal government became the trustee of Indian lands. The government holds the legal title to all Indian lands and is required to manage those lands for the benefit of all Indians.

Underlying the federal trust responsibility is the notion that tribes are incapable of managing their own lands. For much of the twentieth century, tribes had little or no control over their energy resources. Royalties and other payments were historically set by the Bureau of Indian Affairs. The agency consistently undervalued Indian resources and, by all accounts, did a poor job of negotiating and collecting royalty payments.<sup>13</sup> In 1977, the Indian Policy Review Commission concluded that "the leases negotiated on behalf of Indians are among the poorest agreements ever made."<sup>14</sup>

In practice, the federal trusteeship of Indian lands limits opportunities for tribal resource development and self-determination. Although tribes have gradually been granted more control over energy development decisions on their reservations, tribes still must acquire approval for every lease, a process that is notoriously slow and cumbersome. Many investors and energy companies simply avoid Indian lands altogether. In addition, Indians themselves are often skeptical of energy development due to past abuses and mismanagement by the government.

##### **5. Federal regulations and complex bureaucracies raise the cost of energy development on Indian lands.**

On Indian lands, companies must go through at least four federal agencies and 49 steps to acquire a permit for energy development, compared to as few as four steps off reservations. The effect of this complicated bureaucracy is to raise the cost of entering into resource development agreements with tribes or individual Indians.<sup>15</sup>

The number of agencies and regulations involved in Indian energy development results in confusion, overlap, and a lack of coordination between agencies. The Bureau of Indian Affairs (BIA) has the primary authority over the management of Indian trust assets, but other agencies are involved in related issues such as revenue flows and oversight of resource extraction. These include the Bureau of Land Management, the Office of Natural Resources Revenue, the Office of the Special Trustee for American Indians, and if coal is involved, the Office of Surface Mining Reclamation and Enforcement.

<sup>13</sup> Ambler, Marjane. 1990. *Breaking the Iron Bonds: Indian Control of Energy Development*. University Press of Kansas.

<sup>14</sup> Miller, Robert J. 2012. *Reservation "Capitalism": Economic Development in Indian Country*. Bison Books.

<sup>15</sup> Crane-Murdoch, Sierra. 2012. The Other Bakken Boom: A Tribe Atop the Nation's Biggest Oil Play. *PERC Case Study*. Available at <http://perc.org/articles/other-bakken-boom>.

It is not uncommon for several years to pass before the necessary approvals are acquired to begin energy development on Indian lands—a process that takes only a few months on private lands. At any time, a federal agency may demand more information or shut down development activity. Simply completing title search requests results in delays from the BIA. Indians have waited six years to receive title search reports that other Americans can get in a few days.

Tribal energy development projects are subject to a number of federal regulations that do not apply on private lands. For instance, all tribal energy projects must go through National Environmental Policy Act review as well as cultural resource review under the National Historic Preservation Act. Both requirements add to the complexity of energy development on Indian lands, and neither requirement applies to development projects on private lands.

**6. Despite these obstacles, some tribes have succeeded in developing energy resources for the benefit of tribal members and their local community.**

Despite challenges, several tribes have succeeded in developing their resources for the benefit of tribal communities. These tribes have asserted their right to self-determination by taking an active role in resource development.

The Southern Ute Tribe in Colorado, for example, has experienced tremendous success developing its energy resources. The tribe owns and operates five energy companies and invests its energy revenues in a growth fund estimated to be worth \$4 billion. Today, the tribe's 1,400 members are each worth millions and receive dividends every year from the growth fund. The tribe's expertise in energy development extends far beyond the reservation's borders. Red Willow Production Co., a tribal-owned energy company, is engaged in oil, gas, and coal-bed methane extraction throughout the western United States, as well as offshore oil production in the Gulf of Mexico.

The Southern Ute Tribe's success began, perhaps surprisingly, after it declared a moratorium on issuing new energy leases in 1974. The tribal council recognized that the Department of the Interior failed to negotiate appropriate compensation for leases on the reservation. The tribe also lacked the expertise needed to make good decisions about energy development. Following the moratorium, the tribe contracted with outside experts to map and interpret the extent of its undeveloped resources. In the process, the tribe learned the value of their energy resources—and just how undervalued they were by the federal government.

After the tribe lifted the moratorium, it continued to consult with outside experts to guide energy development decisions on the reservation. The tribe contracted with attorneys, auditors, petroleum geologists, and others to take advantage of changes in federal policy that allowed tribes to negotiate their own energy leases. The tribe was also awarded several court settlements for the historic federal mismanagement of tribal assets and used the funds to create Red Willow Energy, its first energy business. By operating its own energy companies, the Southern Ute Tribe established an expertise in resource development and a reputation for good business practices and management.

The tribe's approach to energy development is consistent with its values of self-determination. The tribe conducts its own audits and environmental assessments and operates a land division that is adept at navigating the complex layers of federal agencies that oversee energy projects. Revenues from energy development enable the tribe to pay for government and social services. The tribal-owned energy companies are able to take advantage of their exemption from many of the taxes non-Indian operators must pay. The tribal government has also made efforts to separate politics from business, enabling tribal companies to make their own business decisions.

Other tribes have succeeded in taking control of their natural resources. In the 1990s, the Salish-Kootenai Confederated Tribes on Montana's Flathead Reservation took over more than 100 programs previously run by federal agencies, including forest management. The tribes now earn \$2.04 for every dollar they spend on timber management while the neighboring Lolo National Forest, managed by the federal government, receives only \$1.10 for every dollar it spends.<sup>16</sup> As with other forms of energy development, when tribes are afforded more control over natural resource management, the result has been significantly better management and higher output.

#### **7. Tribes are gaining more control over their natural resources, but challenges remain.**

For much of the twentieth century, tribal energy development was almost entirely controlled by the federal government, with little benefit to tribal communities. Today, however, tribes are slowly gaining more control over the management of their natural resources.

In 1982, the Indian Mineral Development Act (IMDA) allowed tribes, but not allottees, to enter into any type of energy extraction agreement they desired. The act also allowed lease terms and royalty amounts to be determined by tribes rather than by federal agencies. Under IMDA agreements, tribes can negotiate leases, joint ventures, production sharing, and other agreements to develop their resources. These agreements are the primary means by which tribes lease lands for energy development today. Nonetheless, the federal trusteeship of Indian lands still requires that the BIA and other federal agencies review every development agreement and lease.<sup>17</sup>

Congress recently attempted to grant tribes even more control over energy development by allowing tribes to create Tribal Energy Resource Agreements (TERAs). Once a TERA is approved on tribal land, the tribe no longer needs to acquire separate approval for each business arrangement it makes in order to undertake resource development. Thus far, however, no tribe has entered into a TERA because, as one report notes, "the rules and regulations around implementing a TERA are exceedingly complex."<sup>18</sup>

Likewise, the Helping Expedite and Advance Responsible Tribal Homeownership (HEARTH) Act of 2012 removes many of the regulatory hurdles for leasing tribal surface lands. The act enables tribes to create their own leasing regulations and requires the federal government to expedite its approval process. The policy, however, does not apply to "traditional" energy

<sup>16</sup> Berry, Allison. 2009. Two Forests Under the Big Sky: Tribal v. Federal Management. *PERC Policy Series* No. 45.

<sup>17</sup> See Government Accountability Office, "INDIAN ENERGY DEVELOPMENT: Poor Management by BIA Has Hindered Energy Development on Indian Lands." 2015. Available at <https://www.gao.gov/products/GAO-15-502>.

<sup>18</sup> Grogan, Maura. 2011. *Native American Lands and Natural Resource Development*. Revenue Watch Institute.

resources such as oil, gas, and minerals, so it offers no help with the obstacles and delays experienced by many tribes.

#### **8. Policy reforms could help give tribes more authority over their energy resources.**

Several policy proposals could support tribal sovereignty and address the obstacles imposed by the federal government. These include:

- Give tribes and individual Indians the option to exert broad authority over the use of their land and natural resources. For those wishing to exercise such authority, clarify and grant jurisdiction over all natural resources within reservation boundaries.
- Allow tribes and individual Indians to enter into long-term leases, such as 99-year leases, without BIA approval.
- Make it easier for willing tribes to reduce BIA oversight over natural resource management by developing their own management policies and procedures for tribal property and assets.
- Expand policies aimed at streamlining federal approval of certain tribal affairs, such as the Helping Expedite and Advance Responsible Tribal Homeownership (HEARTH) Act of 2012. The HEARTH Act currently allows tribes to create their own surface-land leasing regulations for certain limited purposes. Once a tribe's plan is approved by the Secretary of the Interior, the act allows tribes to enter into leases without further approval. The act should be expanded to apply to subsurface energy leasing as well.
- Streamline the approval process for tribes to enter into Tribal Energy Resource Agreements (TERAs), which would give tribes the authority to make energy development plans without requiring BIA approval for each leasing decision. The current TERA process, established in 2008, is so costly and complex that no tribe has yet entered into such an agreement.

#### **9. Conclusion**

Tribes have demonstrated time and again that they can succeed when the federal government grants them authority over their natural resources. But much more should be done to give Native Americans the same rights and freedoms that other Americans have to manage their natural resources. This could involve a variety of policy reforms that give tribes more authority to manage their own affairs, govern themselves, and control their land and resources.

Tribes should not have to develop their natural resources if they choose not to. But if they do desire it, the federal government should not make it overly costly or burdensome to do so. It's time to give tribes the dignity they deserve by allowing them to make their own decisions about the land and resources in Indian Country.